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NO.

In The
SUPREME COURT OF THE UNITED STATES

KIA P., INDIVIDUALLY AND ON BEHALF OF MORA P.,
Petitioners,

v.

CITY OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a private hospital which acts in concert with, and at the behest of, a municipal child protective agency by refusing to discharge a minor into the care of her parents acts "under color of state law" for purposes of liability under the Civil Rights Act of 1871, 42 U.S.C. §1983, under this Court's analysis in *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n*, 531 U.S. 288 (2001).

2. Whether a municipal child protective agency and a private hospital that acts in concert with and at the direction of the agency violate the Due Process Clause of the Fourteenth Amendment by detaining a newborn without either a predeprivation hearing or a prompt post-deprivation hearing, and continuing to detain the newborn after learning conclusively that there is no basis for the detention, all pursuant to joint policies and customs of the agency and hospital.

LIST OF PARTIES

Petitioners are Kia P. and her minor daughter Mora P. Petitioners were permitted by the District Court to proceed under pseudonyms in view of the sensitive nature of the case. Their names will be disclosed to the Court upon request.

Respondents are the City of New York, Long Island College Hospital, Susan Morance, MSW, Rosemary McIntyre, individually and in her official capacity, and Dorabella Delamothe, individually and in her official capacity. Barbara Sabol and Robert Little, although parties below, are not parties to this petition.

SUPREME COURT RULE 29.6 STATEMENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Kia P. and her minor daughter, Mora P., respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in *Kia P. v. McIntyre*, 235 F.3d 749 (2nd Cir. 2000).

OPINIONS BELOW

The unreported Order Denying Rehearing or Rehearing *En Banc* of the United States Court of Appeals for the Second Circuit appears as Appendix A hereto. The decision of the Second Circuit in *Kia P. v. McIntyre* is reported at 235 F.3d 749 (2d Cir. 2000), and appears as Appendix B hereto. The unreported Second Amended Judgment of the United States District Court for the Eastern District of New York appears as Appendix C hereto. The Memorandum and Order of the Eastern District is reported at 2 F.Supp.2d. 281 (EDNY 1998), and appears as Appendix D hereto.

JURISDICTION

Notice of Appeal was filed on November 25, 1998, from the Second Amended Judgment of the District Court dated October 30, 1998, which dismissed all claims and parties in their entirety, and hence constituted a final judgment pursuant to Fed. Rule App. Proc. 4(a)(1)(A).[1] App. C. The opinion of the United States

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[1] The original Judgment, dated May 1, 1998, ostensibly disposed of all claims and all parties therein. Notice of Appeal was taken therefrom, and the Second Circuit Court of Appeals remanded the

Court of Appeals for the Second Circuit was entered on December 5, 2000. App. B. A petition for rehearing or rehearing *en banc* was denied on February 26, 2001. App. A. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of UNITED STATES CONST. AMENDS. IV and XIV, 42 U.S.C. §1983 (the Civil Rights Act of 1871), and pertinent portions of the New York State and New York City statutes and child welfare regulations are set forth as Appendix H hereto.

STATEMENT OF THE CASE

Petitioner Kia P. brought an action for herself and her daughter Mora, under 42 U.S.C. §1983, against Respondents City of New York, Long Island College Hospital ("Hospital"), and several of their officials and employees, challenging their eleven-day detention of newborn Mora at the Hospital pursuant to joint policies of the City and the Hospital. Under those policies, whenever a Hospital employee reported that the Hospital suspected one of its child patients to be a victim of child abuse or neglect, the City of New York would investigate the report and the Hospital would hold the child patient in the hospital until the City authorized the release of the patient. App. G, Policy; *see generally* App. H. The policies did not provide either the parent or child with due process of law,

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appeal because the Judgment failed to state that cross-claims were dismissed. After a first amendment to the Judgment failed to correct the defect, Notice of Appeal was finally taken in a timely fashion from the October 30, 1998 Judgment.

nor did the policies place any limits on the length of time the child could be held without seeking judicial review. *Id.*

A. STATEMENT OF FACTS

On March 29, 1993, when Petitioner Kia P. was discharged from Respondent Hospital's facility in downtown Brooklyn, she expected to take her two-day-old daughter, infant Petitioner Mora P., with her. Instead, Respondent Susan Morance, a Hospital social worker, announced that the Hospital would not release the newborn because the infant's urine had tested positive for methadone.[2] Mora had been placed on a "social hold," Morance stated, because, pursuant to the Hospital's policy, Kia P. had been reported to the State Central Register for suspected child neglect based upon possible methadone use during pregnancy. The Hospital was unmoved by Kia P.'s statements that she had never used methadone and that the test results must have been a mistake. App. at D4. They threatened to have hospital security remove her from the premises. App. at F4.

In fact, Kia P. was right: the test result was false. The EMIT screening test used by the Hospital is frequently inaccurate. Many substances, including Phenergan, a painkiller routinely administered to women in childbirth,[3] cross-react on the EMIT test, showing false positive results for methadone. App. at D14. Since the

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[2] Methadone is used to treat narcotics addiction (PHYSICIAN'S DESK REFERENCE (55th ed., 2001), at 2825), and is legal only when distributed by an authorized treatment or maintenance program. Otherwise, it is a controlled substance, and its possession is prohibited. N.Y. Penal L. §§220.09(12), 220.18(7), 220.21(2).

[3] The generic name is promethazine. PHYSICIANS' DESK REFERENCE (55th ed. 2001), at 3418.

Hospital itself had administered Phenergan to Ms. P. during labor, App. D22, the results of Mora's drug screening were a foregone conclusion of which the Hospital should have been aware.

Over the next several days, with Mora secure in the Hospital's custody and Kia P. limited to only occasional visits with the infant in the Hospital for the purpose of feeding her, App. D4, the City's Child Welfare Administration ("CWA") (specifically respondents McIntyre and Delamothe) conducted an investigation of the charge that Kia P. was neglectful because she was a drug user. CWA interrogated both Mrs. P. and her husband Edwin P., subjected both parents to the indignity of drug screens (which were negative), searched the petitioners' home, and interviewed Kia P.'s prenatal care providers. App. B5; D3-D4. Based upon the investigation, prior to April 6, 1993, CWA concluded that Kia P. was not a neglectful, drug-abusing mother. However, they still did not authorize the Hospital to release Mora, and, pursuant to the joint policy, the Hospital continued to detain the infant. Nor did they seek a judicial order to provide authority to hold Mora in their custody.

The Hospital, upon Kia. P.'s complaints about the inaccuracy of the test results, had conducted the same screening test on a second sample of Mora's urine on March 29, 1993. That test was negative, casting further doubt on the results of the original test. Joint Appendix at 517-18, 976-77. In addition, the Hospital sent Mora's original urine sample to an outside laboratory for confirmatory testing by a more accurate method which, on April 6, 1993, showed that Mora's urine did not contain methadone. App. at D4. Despite conclusive evidence that Mora had not been neglected, the Hospital still refused to release Mora until it received authorization to release her from CWA. Finally, on April 8, 1993, eleven days after Mora was due home, CWA authorized the Hospital to release her, and she was discharged to her parents'

care.

None of the Respondents ever sought a court order to authorize or approve the removal and detention of Mora P. No Respondent ever initiated judicial proceedings against Kia or Edwin P. in any court. No Respondent ever provided Kia or Mora P. with notice or an opportunity to be heard, before or after the detention of the infant. Instead, Respondents detained Mora P. pursuant to joint policies that the City and Hospital have developed to employ in cases of perceived child abuse and neglect.

The City and Hospital policies have their genesis in federal and state law, but depart from federal and state mandates in one important manner that forms the basis of this lawsuit: the policies deny procedural due process of law to parents and children.

In 1974, Congress enacted the Child Abuse Prevention and Treatment Act ("CAPTA"), PL 93-247, codified at 42 U.S.C. §§5101 *et seq.*, to provide comprehensive national policies and procedures for investigating child abuse. Among its many provisions, CAPTA requires all states that receive federal child abuse funds to have systems for receiving and investigating allegations of suspected child abuse and neglect. 42 U.S.C. §5106a(b)(2)(A)(ii). All states now have such systems, and in 1999, they received 2,974,000 reports of suspected child abuse or neglect. U.S. Dept. of Health and Human Services, *HHS Reports New Child Abuse and Neglect Statistics*, <http://www.acf.dggs.gov/ news/press/2001/abuse.htm> (April 2, 2001).

CAPTA also required all states receiving federal funds to enact legislation requiring certain professionals, known as "mandated reporters," to make reports to a child protective agency if they have any suspicion that a child may be abused or maltreated. 45 C.F.R. §1340.14(c). All states have done so. *See*, National Clearinghouse on Child Abuse and Neglect Information, *Child*

Abuse and Neglect State Statutes, Elements, Reporting Laws; Number 2, Mandatory Reporters of Child Abuse and Neglect, (last modified Dec. 31, 1999) <http://www.calib.com/nccanch/catalog/statutes/cfm>. In New York, a mandated reporter's failure to make a required report is punishable by up to a year in jail. N.Y. Soc. Serv. L. §420(1); N.Y. Penal L. §70.15(1).

CAPTA also requires all states to provide "emergency services" to abused or neglected children who require immediate protection, 42 U.S.C. §5106a(3)(A)(iii), including, if necessary, removal of a child from a dangerous situation. 45 C.F.R. §1340.14(f). As a result, the states have enacted laws authorizing government child protective agents and, in some cases certain private individuals, to remove children from their parents' custody without a court order if the children are in immediate danger from child abuse or maltreatment.[4]

In New York State, the only individuals who have the authority to take children into protective custody are police officers, peace officers, law enforcement officials, employees of a city or county department of social services, agents of the Society for Prevention of Cruelty to Children, and hospital directors. N.Y. Soc. Serv. L. §§417(1)(a) and 417(2). App. at H2-H3. Of that group, only hospital directors are not government agents or employees. The

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[4] *See, e.g.*, 23 Pa. Code §6315(A)(2) (2000) (physicians and hospital directors); Ala. Code §26-14-6 (2001) (physicians and hospital directors); Del. Code Ann. tit. 16, §907(a) (2000) (physicians); 325 Ill. Comp. Stat. 5/5 (West 2001) (physicians); Nev. Rev. Stat. Ann. §432B.390(1) (Michie 2001) (law enforcement, juvenile services, or child protective agents); Tenn. Code §37-1-113(a)(3) (2001) (law enforcement officer, state social worker, or authorized officer of the court); Wis. Stat. §48.19(d) (2000) (law enforcement officers); Wyo. Stat. Ann. §14-3-208(a) (Michie 2000) (medical staff).

hospital directors' authority is limited: they may keep a child in custody only until the next business day, N.Y. Soc. Serv. L. §417(2), App. H2-H3, and they must notify the local child protective agency immediately. *Id.*

In the City of New York, and around the country, hospitals, in conjunction with local governments, have developed policies and practices for addressing cases of perceived child abuse and maltreatment. Despite the contradictory statutory provisions, New York City's standard practice is that in all cases where an employee of any hospital reports a suspicion that a child patient may have been abused or neglected, the hospital must take custody of that child, and detain the child in the hospital until New York City's child protective agency, the Child Welfare Administration, authorizes the hospital to release the child. App. at D4.[5] The Hospital has incorporated that policy into its own Administrative Policy on Abused or Maltreated Children. *See* App. G.; D10. Neither policy requires, or even suggests, that the City or Hospital seek judicial review of the seizure and detention. Neither policy places any limit on the length of time that the City and Hospital can detain a child without judicial review. Normally, when a parent wishes to discharge a child patient from the Hospital without the consent of the Hospital, the parent may discharge the child, even if it is against medical advice. App. at B12, n.2. However, if a child is being held pursuant to the policy, after the Hospital has made a report of suspected child maltreatment, the Hospital will not discharge the child at all. App. at D10.

While New York law permits hospitals to detain children who are in immediate danger because of parental abuse or neglect, N.Y.

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[5] The custom contravenes not only New York's statutes, but also its regulations, 18 N.Y.C.R.R. §432.3(o), and its written pronouncements. *See* App. B22, n. 5.

Soc. Serv. L. §417(2), there is no law permitting a hospital to detain children based upon the mere making of a report of suspected abuse or neglect. Moreover, even in those cases where hospitals detain child patients because of immediate danger, the hospitals cannot detain the children indefinitely, but only until the next business day. *Id.*

In addition, it is the law in New York that a positive drug screening test on an infant is not sufficient grounds for taking the infant into protective custody. "A report which shows only a positive toxicology for a controlled substance generally does not in and of itself prove that a child has been physically, mentally, or emotionally impaired, or is in imminent danger of becoming impaired." *Nassau County Department of Social Services o/b/o Dante M. v. Denise J.*, 87 N.Y.2d 73, 79, 661 N.E.2d 138, 140-41, 637 N.Y.S.2d 666, 668 (1995).

Acting pursuant to their own policy, which trumped both the federal and state laws referenced above, the Hospital and City detained Mora P. and kept the newborn away from her birth mother, on completely false charges.

B. Proceedings and Decisions in the Courts Below

Kia P. filed the instant action on February 16, 1994, for herself and on behalf of Mora. Edwin P., Kia's husband and Mora's father, had died three months earlier and was not a party to the action. Kia P. sought damages for herself and Mora under 42 U.S.C. §1983 for the seizure and eleven-day detention of Mora without probable cause or due process of law.

Kia P. named as defendants the City of New York and Long Island College Hospital, which acted together to detain the newborn. She also named several of the City's child protective

officials and employees, and the Hospital social worker, Susan Morance.

Upon the completion of discovery, all defendants moved for summary judgment. On April 28, 1998, United States District Judge Frederic Block granted summary judgment in favor of all defendants. App. D. He ruled that the Hospital and Morance acted under color of state law for purposes of 42 U.S.C. §1983, App. at D11, but that none of the defendants violated the constitutional rights of either Kia P. or Mora P. App. D14-D21. He also ruled that Respondents McIntyre and Delamothe were entitled to good faith immunity. App. at D27.

Kia P. and Mora P. timely appealed from the amended judgment, and none of the defendants cross-appealed. On December 5, 2000, the Second Circuit Court of Appeals ruled that the Hospital *did not* act under color of state law when it detained Mora from March 29 through April 6, 1993, because, it held, the detention was for medical reasons only. App. at B13-B14. The court ruled that from April 6 through 8, 1993, the Hospital *did* act under color of state law, but found the detention of the infant to be a reasonable seizure under the Fourth Amendment, and concluded that the due process clause of the Fourteenth Amendment did not require any type of hearing because of the brevity of the detention. App. at B21-B22. The Second Circuit also found that the City and its employees did not participate in the seizure or detention of Mora. App. at B23.

Kia P. and Mora P. timely filed a petition for rehearing or rehearing *en banc*. On February 26, 2001, the Second Circuit denied the petition. App. at A1-A2.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO FOSTER CONSISTENCY AMONG THE CIRCUIT COURTS OF APPEAL IN THE STANDARD FOR DETERMINING WHEN AN OTHERWISE PRIVATE ACTOR SUBJECTS ITSELF TO LIABILITY BY DEPRIVING CITIZENS OF FEDERAL RIGHTS "UNDER COLOR OF STATE LAW"

Members of this Court have recognized that "cases deciding when private action might be deemed that of the state have not been a model of consistency...." *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378 (1995) (O'Connor, J., dissenting). The instant case provides this Court with an opportunity to further refine the test for state action under 42 U.S.C. §1983 to provide guidance for the lower courts in determining when a nominally private actor, such as a hospital, acts under color of state law. As the Second Circuit recognized, "Our decision in this case turns in large part on our conclusion that the Hospital was not a state actor...." App. at B14, n.3.

A. The Second Circuit Decision Conflicts with this Court's Decision in *Brentwood Academy*

The Second Circuit issued its decision in the instant case without the benefit of this Court's most recent statement on the issue of state action. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). In *Brentwood*, this Court clarified the "entwinement" test for determining whether a private organization operates under color of state law. The District Court, foreshadowing the holding in *Brentwood*, applied the entwinement test to find the Hospital to be

a state actor because its actions were "sufficiently 'entwined' with City policy to warrant its being treated as a state actor for the purposes of this action." App. at D10-D11. The Second Circuit rejected the entwinement test, and focused solely on the Hospital's activities, ignoring the role of the City and the City and Hospital's joint policy that denied Petitioners any due process procedures. In doing so, the Second Circuit, while noting that Mora would have been held in any event pursuant to the joint government/Hospital policy, determined that Mora was held for medical reasons because the Hospital was providing some medical services to her. The Second Circuit's reasoning was based on the flawed premise that the Hospital could not be a state actor while still performing some private acts. App. at B12-B13. The Second Circuit stated "...the refusal of the Hospital to release Mora to her mother for reasons relating to child abuse and child welfare laws did not become effective until the medical release was issued and Mora was no longer being held by the Hospital's doctors for treatment and observation." App. at B13. The holding in *Brentwood* nullifies the Second Circuit's opinion. *Brentwood*, as in the case below, involved a private organization (athletic board) performing its normal function (regulating interscholastic sports). This Court in *Brentwood*, unlike the Second Circuit below, still found state action because the government was so entwined with the activity that was being performed. *Brentwood* clarifies that the test for state action is the degree of interaction between the putatively private actor and the state with respect to the state action, not what other nongovernmental activities the private actor may be undertaking.

In failing to apply the entwinement test, the Second Circuit gave short shrift to the development of the joint unconstitutional policies that led to the detention of Mora in the first instance - the instruction from CWA that, once a call based on mere suspicion had been made to the State Central Register, the child would be held until the

government authorized her release.

The District Court below made extensive findings of fact on this issue. *See* App. D10. The court noted that Respondent Morance testified that "once a case has been referred to CWA, the Hospital will not release a child, even if he or she has been medically cleared for release, without prior approval of CWA." *Id.* In addition, the court found her testimony corroborated by the Hospital's policy manual, which stated that when a case is referred to the local CWA office, "the [Hospital] social worker will so document in the chart and the child will be admitted and held pending the outcome of the local CWA's field unit's investigation." *Id.* This policy clearly furthered an interest of the state, not a therapeutic interest. *Cf. Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001). "Finally," the court stated, "CWA apparently had a policy in 1993 that it had to approve a child's release from a hospital if the child was the subject of an ongoing investigation." *Id.* In this case, as all parties concede the call to the Register itself triggered an automatic "social hold" on Mora P which required her detention. Naturally while she was being detained, the Hospital observed her and was prepared to provide any medical treatment that she may have needed while in the facility (in point of fact she required none, as she had never been exposed to methadone). Indeed, the Constitution required the Hospital to provide medical treatment to Mora while she was detained in the custody of a state actor. *See, West v. Atkins*, 487 U.S. 42 (1988)

This Court has identified several different criteria for determining whether private action is state action. Conduct has been held to be under color of state law "when a private actor operates as a willful participant in joint activity with the State or its agents," *Brentwood, supra* at 930, *citing Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982), or when a private entity "has been delegated a public function by the State." *Id.*, citing *West v.*

Atkins, *supra*, 487 U.S. at 56. The instant case presents the question of whether the entwinement test should be used to evaluate a situation where a private organization (in this case a hospital) can be so entwined with a public organization (in this case a child protective agency) that the private organization becomes a state actor while performing both a public (detaining the child) and private (treating the child) function.

If a private organization is entwined with the state for all purposes, then it becomes a state actor for all relevant purposes. "Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards." *Brentwood*, *supra*, at 933. If a private organization is not generally entwined with the state, it may, as here, still be considered a state actor at certain times, *e.g.*, when it engages in joint activity with the state, *see Lugar, supra*, or when it performs a public function at the behest of the state. *See West*, *supra*. Here, however, the Hospital acted to seize Mora P. based upon the authority delegated to it by the City when the City required the Hospital to hold children until the City authorized their release. That activity brings the Hospital's conduct within the purview of state action because it was performing a public function delegated by the state. *Brentwood, supra at* 930; *see also, West v. Atkins*, *supra*, at 55-56 (holding that a private doctor was a state actor even though he was not on a regular state payroll because his "function within the state system... [determined] whether his actions can fairly be attributed to the State").

"Careful attention to the gravamen of" Petitioners' due process claims, *see Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982), should have led the Second Circuit to the same conclusion as the District Court: that at every step, Respondents' conduct was not just permitted or authorized by state law, *cf. American Manufacturers Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), but actually

required by it. Petitioners alleged below that the joint conduct of the municipal and private actors deprived them of due process in several ways.

First, Petitioners alleged, Respondents' joint policy required seizure of Mora P. without a demonstration of "emergency circumstances" or a pre-deprivation hearing, upon a mere finding by CWA that the child may be abused or neglected.

Second, Petitioners alleged, Respondents' joint policy permitted the Hospital to hold Mora indefinitely without either CWA or the Hospital obtaining a prompt post-deprivation judicial hearing, until CWA authorized her release.

Third, Petitioners alleged, Respondents' joint policy required continued seizure of Mora after the more accurate drug test confirmed she was not abused or neglected, and hence after any medical reason for her detention was dissipated, without a prompt post-deprivation hearing, until CWA authorized her release.

Every one of these aspects of Respondents' joint conduct, like the initial required report to the State Central Register, was affirmatively required by New York State social welfare laws, CWA regulations, or CWA policies and customs. The Hospital's Child Abuse and Neglect administrative policy discloses that the Hospital worked hand in glove with CWA officials from the moment when abuse or neglect of a minor patient was suspected. App. G. The record discloses not mere regulation of private hospitals *vis-a-vis* child abuse reporting, *cf. Blum*, 457 U.S. at 1004; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), or the mere "approval or acquiescence of the State," *Blum*, 457 U.S. at 1004-05; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); rather, it conclusively demonstrates that the City of New York, through its child welfare statutes, policies and customs, "exercised coercive power or ... provided such significant encouragement, either overt or covert, that the choice [to hold

Mora P. without providing judicial process] must in law be deemed to be that of the State." *American Manufactuers Mut. Inc. Co., supra*, at 52, citing *Blum*, 457 U.S. at 1004-05; *Flagg Bros., supra*, 436 U.S. at 166; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970).

In examining the Second Circuit's opinion below, it is clear that it is inconsistent with this Court's recent instruction in *Brentwood Academy, supra*. The court below ruled that because there were medical reasons to hold Mora, there was no state action. In doing so, the Second Circuit disregarded the substantial evidence of the CWA's involvement in the detention of the child and the governmental function the hospital was performing. This fact is particularly disturbing when one considers the clear factual and legal determinations made by the District Court that the hospital was a state actor for the whole detention because of its entwinement with the City. Therefore, this Court should grant certiorari to consider the question whether, in light of *Brentwood Academy*, a hospital is a state actor when it is holding a child at the behest of a municipal child protective agency, even if the hospital may incidentally provide medical services to the child.

B. The Circuits are Split on the Issue of State Action when a Hospital Detains a Child in Compliance with a Government Child Protective Agency Directive

The Second Circuit's decision has created a split in the Circuits on the question of whether there is state action when a private hospital detains a minor for child protective reasons. The Eleventh Circuit Court of Appeals, in *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990), *cert. denied sub nom. Dempsey v. Bendiburg*, 500 U.S. 932 (1991), took a position opposite to that of the

Second Circuit in this case. The facts of *Bendiburg* are quite similar to those in Petitioners' case. *Bendiburg* involved a 15-year-old boy who had been severely injured in an automobile accident and was being cared for at home by medical staff. *Id.* at 466-67. The staff recommended a particular medical procedure, to which the boy's father objected on the ground that it was too risky. *Id.* The medical staff contacted the local child protective agency, which obtained an *ex parte* order of temporary custody of the child, consented to the medical procedure, and detained the child for five days. *Id.* Sixteen days later, the boy died of complications from that procedure. *Id.*

The District Court held that the record "does not reveal... the kind of joint action necessary to support a claim of state action on the part of the private defendants." *Id.* at 468. The Eleventh Circuit reversed, holding that the private medical staff "can be held liable in a §1983 action if they act in concert with state officials in depriving a plaintiff of constitutional rights." *Id.* at 468. Relying upon this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, to reverse, the Eleventh Circuit held that the plaintiff needed to show only "an understanding" and "willful participation" between private and state defendants, not a "smoking gun." *Id.* at 469.

In the instant case also, Mora was held by the Hospital against the will of her parents. Kia and Mora P. showed that the City of New York and the Hospital had an understanding regarding the policies of detaining children in the Hospital without due process of law, while the City investigated allegations that the parents had mistreated those children, and of not releasing the children to their parents until the City authorized the Hospital to do so. In this case, the Hospital and City followed those policies, as the Hospital detained Mora until the City completed its investigation and authorized her release.

The Second Circuit recognized that Mora was held, in part, because of the Hospital's compliance with the City's child protective policy. App. B4-B5. However, the Second Circuit, unlike the Eleventh Circuit in *Bendiburg*, refused to find state action, even though Kia P. showed, and Respondents conceded, the understanding and willful participation between the Hospital and the City child protection agency.

In ruling against Kia and Mora P. on the issue of state action, the Second Circuit reached a factual conclusion which was unwarranted by the evidence, improper on a motion for summary judgment, and inconsistent with this Court's decisions on causation in actions under 42 U.S.C. §1983. The Second Circuit found "no evidence that CWA or any of its employees proximately caused Mora to be kept from her parents without a hearing." App. B23. That factual conclusion violates the rule of this Court that joint action between a government employee and a private party may be inferred from the facts of a case, and "on summary judgment the inferences to be drawn from the underlying facts" are "open to a jury...." *Adickes v. Kress,* 398 U.S. at 159-60. *See also Martinez v. California*, 444 U.S. 277, *reh'g den.*, 445 U.S. 920 (1980) (imposing proximate cause requirement for establishing Section 1983 liability); *Estate of Bailey v. New York*, 768 F.2d 503, 511 (3rd Cir. 1985) (causation normally a question of fact).

As the Second and Eleventh Circuits have now taken contradictory positions on the state actor status of private hospitals acting in conjunction with child protective agencies on cases with very similar facts, a clear split in the Circuits has developed. This Court should grant certiorari in order to foster uniformity on this important issue.

C. This Case is Appropriate for Review by a Grant of Certiorari, Vacatur and Remand in Light of this Court's Decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association.*

Petitioners submit that this case raises important issues that deserve a substantial review on the merits. However, the case is also appropriate for disposition by a grant of certiorari, vacatur and remand in light of this Court's recent decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

Brentwood Academy was decided on February 20, 2001, more than two months after the Second Circuit issued its decision in the instant action, but shortly before the Court of Appeals issued its order denying reconsideration or rehearing *en banc*, on February 26, 2001. *See* App. A. Thus, the Second Circuit did not have the benefit of this Court's decision on state action when it reached the conclusion that Respondents Long Island College Hospital and Morance did not act under color of state law when they first seized and detained Mora. It should have ordered reconsideration or rehearing of the decision when it became clear that the Supreme Court had spoken directly on this issue in the interim in *Brentwood Academy.*

This Court's power to vacate and remand in light of an intervening decision by the Court is well-established:

> [T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent judges. We have GVR'd in light of a wide range of developments, including our own decisions....

Lawrence v. Chater, 516 U.S. 163, 166-67 (1996). The reasons for issuing a GVR order are numerous:

> [A] GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues....

Id. at 167.

An order granting certiorari and vacating and remanding is appropriate when "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration...." *Id.* at 167. A GVR order is also "appropriate to preserve the operational premise of a multitiered judicial system (*viz.*, that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below." *Id.* at 181 (Scalia, J., dissenting).

In the instant matter, a GVR order is especially appropriate because the Second Circuit decision in the instant case departed so dramatically from this Court's manner of analysis in *Brentwood Academy*, *supra*. *See* Point IA, *supra*.

II. Certiorari Should be Granted to Resolve a Split Among the Circuit Courts as to the Applicability of the Due Process Clause to Deprivations of Parental Custody by Child Welfare Officials

As this Court has repeatedly recognized, the liberty interest of "parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests...." *Troxel v. Granville*, 530 U.S. 57, 62 (2000). As early as 1923, this Court held that Americans' right to liberty, protected by the Due Process Clause of the Constitution, includes the right to "establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This Court has recognized the liberty interest of parents in their children as one of the "basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1962) and has found that the right of a parent to custody of her child is "far more precious... than property rights...." *May v. Anderson*, 345 U.S. 528, 533 (1953). The liberty interest of the family rests upon "the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). Thus, "[t]o say that the institution of the family is deeply rooted in this nation's history and tradition borders on understatement. The unitary family is the foundation of society. Through the intimate relationships of the family, our children are nurtured, tutored in the values and beliefs of our society, and prepared for life." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994).

It is well established that children as well as parents have an interest in the parent-child relationship: "until the state proves parental unfitness, the child and his parents share a vital interest in

preventing erroneous termination of the natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).[6] The lower courts agree. *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000) (the "right of a child to be raised and nurtured by his parents" is "fundamental"); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2nd Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children"); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) ("a child's right to family integrity is concomitant to that of a parent"). At the most basic level, the family has a "right to remain together without the coercive interference of the awesome power of the state." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2nd Cir. 1976).[7]

Because of the magnitude of the interests of parents and children in each other's care and custody, the Constitution prohibits the state from depriving individuals of these important interests "without due process of law." UNITED STATES CONST. AMEND. XIV, §1.

In the instant case, Petitioners claimed that the policies of the City and Hospital deprived both Kia P. and Mora P. of their right

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[6] For this reason, the Court of Appeals' determination to review Mora P.'s claim of unlawful detention under the Fourth Amendment's less strict standard of "reasonableness under the circumstances" was clear error, which should be corrected if the Court grants certiorari.

[7] It was perhaps in recognition of this unequivocal precedent that the Court of Appeals declined to adopt the District Court's dubious conclusion that Respondents had not substantially deprived Kia P. of her substantive due process right to parental custody because she was allowed to visit Mora occasionally in order to feed her, and instead decided the case on state action grounds.

to procedural due process because those policies did not provide for either pre-deprivation or post-deprivation hearings and that those policies consequently violated the Due Process Clause of the Fourteenth Amendment. Both the District Court and the Second Circuit found that the City and Hospital did not have to provide hearings, though they used different reasoning. In determining that Kia P. and Mora P. were not entitled to any hearing at all, the District Court and Second Circuit applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), balancing the "private interests... affected by the official action," the "risk of an erroneous deprivation of such interest... and the probable value, if any, of additional or substitute procedural safeguards," and the government's interest. *Id.* The courts concluded that due process did not require either a pre-deprivation hearing or a prompt post-deprivation hearing.

The District Court found the hearing requirement of the Due Process Clause to be obviated for "pragmatic" reasons. App. at D18. Those reasons were "the imminence of the test results and the probability of confirmation...." *Id.*

The Second Circuit, having found no state action until April 6, 1993, concluded that neither a pre-deprivation hearing nor a post-deprivation hearing was constitutionally required because "Mora was not taken from Kia. Kia placed her child in the care of a non-governmental actor for medical care when she gained admission to the Hospital and gave birth there." App. at B19. The Second Circuit held that no post-deprivation hearing was required because the Constitution allows "breathing room" to permit child welfare officials "to determine what action should be taken after parent and child have been separated." App. at B22.

The basic governing law is that "the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494

U.S. 113, 128 (1990) (emphasis in original). Specifically, "[i]n situations where the State feasibly can provide a pre-deprivation hearing... it generally must do so...." *Zinermon*, *supra*, at 132. Thus, in *Zinermon*, this Court held that the state was required to provide a hearing prior to taking a mentally ill adult into state custody.

The circuits which have addressed the issue have come to conflicting conclusions as to what process is due when the State seeks to separate a parent from a child. Petitioners seek certiorari to resolve the conflict. The Eleventh Circuit Court of Appeals has articulated the strongest opposition to the Second Circuit position. In *Bendiburg v. Dempsey*, 909 F.2d at 468, the Eleventh Circuit held that a father and a child may have had valid claims for deprivation of procedural due process, and that the validity of the claims would turn on "whether the notice and post-deprivation hearing were adequate under the circumstances." 909 F.2d at 468. The court therefore remanded for additional fact-finding on that issue.

In the Tenth Circuit, the rule is that the "removal of children from the custody of their parents requires a pre-deprivation notice and a hearing except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997), quoting *Spielman v. Hildebrandt*, 873 F.2d 1377, 1385 (10th Cir. 1989), and *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848 (1977).

The Ninth Circuit rule is that "[g]overnment officials are required to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that established 'reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the

scope of the intrusion is reasonably necessary to avert that specific injury.'" *Mabe v. San Bernardino County Department of Social Services*, 237 F.3d 1101, 1106 (9th Cir. 2001), quoting *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000), citing *Mincey v. Arizona*, 437 U.S. 385 (1978). Even in emergency situations, the Ninth Circuit requires that the parents be provided with a prompt post-deprivation hearing. *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998).

In the Eighth Circuit, "when the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state has the burden to initiate prompt judicial proceedings to provide a post deprivation hearing." *Whisman v. Rinehart*, 119 F.3d 1303, 1311 (8th Cir. 1997), citing *Weller v. Dep't. of Soc. Servs. for Baltimore*, 901 F.2d 387, 396 (4th Cir. 1990).

In the Seventh Circuit, "a child's right to be nurtured by his parents cannot be denied without an opportunity to be heard in a meaningful way." *Brokaw v. Mercer County*, 235 F.3d at 1020. At a minimum, the court held, due process "means that government officials will not remove a child from his home without an investigation and pre-deprivation hearing resulting in a court order of removal, absent exigent circumstances." *Id.*

The Sixth Circuit holds that parents are entitled to notice and an opportunity to be heard prior to the removal of children from the parents' physical custody, even when the children are already in the legal custody of the state. *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983), *cert. den.* 465 U.S. 1033 (1984). In emergency situations, the state may remove the children without prior notice, but must provide due process promptly thereafter. *Id.*

The Fifth Circuit holds that the Fourteenth Amendment "grants parents the right to fundamentally fair procedures before having their child removed from their home." *Morris v. Dearborne*, 181

F.3d 657, 669, n.7 (5th Cir. 1999) *reh'g den'd,* 196 F.3d 1259 (5th Cir. 1999). *Morris* concerned the type of hearing required, rather than the timing of the hearing. *Wooley v. City of Baton Rouge*, 211 F.3d 913, likewise upheld the right of a child to live with his parent, but did not discuss the procedural aspects of the removal of the child.

The Fourth Circuit takes a minority view, more akin to the decision of the Second Circuit in this case. That court has held that "the requirements of procedural due process are flexible." *Jordan by Jordan v. Jackson*, 15 F.3d at 348. Thus, when child welfare employees removed a 10-year-old boy from the custody of his parents and held him for 65 hours without a hearing, the Fourth Circuit found that the child welfare department had not deprived the claimants of due process of law. "[T]he 65-hour delay in judicial review of Christopher Jordan's emergency removal, over a weekend, ...did not unconstitutionally infringe upon the Jordans' substantial private interests in their family's integrity." *Id.* at 350. The court did note, however, that "this period is near, if not at, the outer limit of permissible delay between a child's removal from his home and judicial review." *Id.* at 351.

The Third Circuit has held that "the Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process." *Croft v. Westmoreland County Children and Youth*, 103 F.3d 1123, 1125 (3rd Cir. 1997). The Third Circuit holds that "initiating child custody proceedings by ex parte orders is generally constitutional *if a prompt post-deprivation hearing is held.*" *Miller v. City of Philadelphia*, 174 F.3d 368, 373 (3rd Cir. 1999) (emphasis

supplied).[8]

Not one of the Circuits besides the Second has held that "pragmatic reasons" justify the government's failure to provide any type of hearing whatsoever. Petitioners suggest that, where the Constitution imposes an "added burden" upon the government, the "inconvenience is justified in a free society to protect constitutional values." *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 321 (1972). Obtaining judicial approval "is not an inconvenience to be somehow weighed against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement," including the enforcement of child welfare laws. *Id.* at 315-16, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). "[E]fficiency is not the standard-bearer of due process. Indeed, efficient governance and due process struggle in an inherently tense relationship." *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 892 (5th Cir. 1989). "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. at 393. Nor can efficiency justify the disregard of the Due Process clause of the Fourteenth Amendment.

Petitioners submit that the constitutional analysis is not nearly so convoluted as the analyses of the District Court and Second Circuit suggest. Rather, the issues are simple and straightforward. Parents have a liberty interest in their children recognized by the substantive due process component of the Fourteenth Amendment, as children

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[8] The First Circuit has not reached the issue. *See Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992), concluding that parents' procedural due process rights are not clearly established.

do in their parents. These interests are protected by procedural due process of law. When the State seeks to deprive a parent of the custody of her child and to deprive the child of her parent, the State must provide a pre-deprivation hearing. In emergency situations, where the child is immediately threatened with harm, the State may take custody without a hearing, but must then provide a prompt post-deprivation hearing. Where a state actor takes a child from a parent and fails to provide a hearing, he has deprived both the parent and the child of due process of law.

Here, the lower courts based their decisions on the discredited assumption that the end (protecting children from allegedly drug-using parents) justifies the means (depriving parents and children of familial integrity without due process of law). As a constitutional matter, no goal, however laudable, justifies the suspension of the Bill of Rights: "those who torment us for our own good will torment us without end for they do so with the approval of their own conscience." Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1952). The state registers no gain toward its stated goals when, as here, it separates fit parents from their children. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

In much of the procedural due process jurisprudence of this Court and the lower courts, the motives of the government actors may have been sincere and even admirable. However, this Court has consistently recognized that the benign motives of government officials in detaining individuals cannot, as a constitutional matter, substitute for due process of law.

CONCLUSION

For the reasons set forth above, Petitioners pray that their Petition for Writ of Certiorari be granted and that this Honorable Court decide the issues raised in the Petition, or in the alternative,

that the Court vacate the judgment of the Second Circuit and remand the case to the District Court for further proceedings not inconsistent with the standards enunciated in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288.

Respectfully submitted,

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May 25, 2001

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of February two thousand one.

KIA P., individually and on behalf of Mora P., an infant and MORA P.

Plaintiffs - Appellants,

v. Docket No. 98-9595

ROSEMARY MCINTYRE, Individually and as the caseworker, Child Welfare Administration, DORAN DELAMOTHE, individually and as Supervisor, Child Welfare Administration, BARBARA SABOL, individually and as Commissioner of Social Services of the City of New York, ROBERT LITTLE, individually and as Deputy Commissioner of Social Services of the City of New York, NEW YORK CITY,

Defendants-Cross-Defendants - Appellees,

LONG ISLAND COLLEGE HOSPITAL and SUSAN MORANCE,

Defendants-Cross-Claimant - Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Kia P.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE
Clerk

By:_____/s/_____
Beth J. Meador,
Administrative Attorney

KIA P., individually and on behalf of Mora P., an infant, and MORA P., Plaintiffs-Appellants, - v. - ROSEMARY MCINTYRE, individually and as caseworker, Child Welfare Administration, DORAN DELAMOTHE, individually and as supervisor, Child Welfare Administration, BARBARA SABOL, individually and as Commissioner of Social Services of the City of New York, ROBERT LITTLE, individually and as Deputy Commissioner of Social Services of the City of New York, NEW YORK CITY, Defendants-Cross-Defendants-Appellees, LONG ISLAND COLLEGE HOSPITAL and SUSAN MORANCE, Defendants-Cross-Claimants-Appellees.

Docket No. 98-9595

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

235 F.3d 749; 2000 U.S. App. LEXIS 31151

September 14, 1999, Argued
December 5, 2000, Decided

SUBSEQUENT HISTORY:
[**1] As Amended January 3, 2001. As Amended February 2, 2001.

DISPOSITION:
Affirmed.

OPINIONBY:
SACK

OPINION:

[*751] SACK, Circuit Judge: This appeal arises from the withholding of a newborn infant from the custody of her parents on the basis of a toxicology test administered shortly after her birth that indicated the presence of methadone in her urine. The infant, plaintiff Mora P., was held by defendant Long Island College Hospital against the stated wishes of her mother for a total of ten days, during the first eight or nine of which the hospital was awaiting [**3] the results of a confirmatory urine test. As soon as results of a test showing that there was in fact no methadone in the infant's urine were received, the hospital medical staff gave her medical clearance to be discharged. She remained in the hospital for a day or two more, nonetheless, while a hospital social worker contacted the New York City Child Welfare Administration and received word from the agency that in its judgment the child should be discharged. She was thereupon released to her parents.

The child's mother, plaintiff Kia P., brought suit individually and on behalf of her infant daughter Mora alleging, *inter alia*, that the defendants infringed their constitutional rights in violation of 42 U.S.C. § 1983. The district court (Frederic Block, Judge) granted the defendants' motions for summary judgment and dismissed the plaintiffs' complaint in its entirety. *See Kia P. v. McIntyre*, 2 F. Supp. 2d 281, 295-96 (E.D.N.Y. 1998). The plaintiffs appealed the portions of the district court's judgment holding that: (1) the defendants did not violate the plaintiffs' substantive due process rights under the Fourteenth Amendment by unjustifiably [**4] infringing the plaintiffs' interests in family integrity; (2) the defendants did not violate the plaintiffs' procedural due process rights under the Fourteenth Amendment by removing Mora from the custody of her parents without a pre- or post-deprivation [*752] hearing; (3) the defendants did not violate Mora's rights under the Fourth Amendment by conducting an unreasonable seizure; (4) the defendants did not violate the plaintiffs' equal protection rights

under the Fourteenth Amendment by discriminating against the plaintiffs on the basis of Kia's HIV-positive status; and (5) certain of the individual defendants are protected by the doctrine of qualified immunity. We affirm the judgment of the district court without reaching the issue of qualified immunity.

BACKGROUND

On March 27, 1993, Kia P. went into labor. Believing it would be impossible to reach the North Central Bronx Hospital, where she had received prenatal care, in time, she went to Long Island College Hospital (the "Hospital") to give birth. The Hospital is privately owned and operated. When she was admitted, Kia disclosed that she had abused crack cocaine in the past, that she was HIV-positive, and that she had a history [**5] of tuberculosis and syphilis.

Later that day, Kia's daughter, Mora, was born. Kia's husband, Edwin P., accompanied Kia to the Hospital and was present for Mora's birth.

Because of Kia P.'s HIV-positive status and history of tuberculosis and the Hospital's belief that Kia had not received adequate prenatal care, in accordance with Hospital policy, the Hospital tested a sample of Mora P.'s urine for drugs shortly after her birth. On March 29, 1993, the Hospital's test indicated the presence of methadone in Mora's urine. That day, a Hospital social worker, defendant Susan Morance, who is a "mandated reporter," i.e., a person who, by the nature of her professional position, is required by New York state statute to make reports to the State of suspected abuse or maltreatment of children, n1 notified the New York State Central Registry for Child Abuse of the positive drug test. The Registry in turn notified the New York City Child Welfare Administration ("CWA").

n1 N.Y. Soc. Servs. Law § 413 provides:

> The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child ...: any physician; registered physician assistant; surgeon; medical examiner; ... resident; intern; psychologist; registered nurse; hospital personnel engaged in the admission, examination, care or treatment of persons; ... social services worker;... or mental health professional ....

[**6]

Also on March 29, 1993, Kia P. was discharged from the Hospital. When she asked to take Mora home with her, Morance denied her request because, Morance told Kia, methadone had been detected in the baby's urine. According to Kia, Morance explained: "I have to talk to ... CWA," and, "Your daughter has a social hold on her. You will not be able to take her home. This is a case of CWA." Morance also allegedly stated that Kia could not stay in the Hospital with Mora, and that Kia would be forcibly ejected by Hospital security if she tried to stay. Kia was told, by her account, that she could "come in and see her daughter and feed her," but could not take her home.

There is no dispute that the Hospital had two reasons for retaining Mora. First, the Hospital's medical staff believed Mora had methadone in her bloodstream and was in danger of suffering from methadone withdrawal, a potentially fatal condition. As the district court noted, "there is undisputed evidence in the record that an infant's methadone withdrawal can take a minimum of one week to manifest itself. Hospital records indicate that Mora exhibited tremors and irritability, which are symptoms consistent with methadone [**7] withdrawal." *Kia P.*, 2 F. Supp. 2d at 285. The second reason

for holding Mora was the Hospital's compliance with Hospital and [*753] CWA policies requiring that any child under investigation by CWA not be released from the Hospital without CWA permission.

Either of these considerations could have resulted in the Hospital's retention of Mora. But from our review of the record on appeal we conclude as a matter of law that between the receipt of the results of the first test and Mora's ultimate medical clearance eight or nine days later, Mora was held by the Hospital for medical reasons, not concerns about possible parental mistreatment and CWA policies. It was the medical staff that made the initial decision to withhold Mora's release because of the danger of methadone withdrawal. And from Mora's birth to her medical release, the infant was under medical observation and care by the Hospital's medical staff.

Kia P. denied ever having used methadone, and she and her husband voluntarily submitted to drug tests, each of which yielded a negative result. Mora's urine sample, meanwhile, was sent by the Hospital to an outside laboratory, SmithKline Beecham, for confirmatory testing. [**8] Because of the small quantity of urine submitted to it, the laboratory was unable to perform the requested tests. The sample was therefore sent to a second outside laboratory, National Medical Services, for analysis by gas chromatography/mass spectrometry, a more sophisticated testing method. During this period, Hospital medical personnel monitored Mora for further symptoms of methadone withdrawal. Then, on April 6 or 7, 1993, the Hospital was informed by National Medical Services that its test indicated that there was no methadone in Mora's urine.

The same day, shortly after receipt of the gas chromatography/mass spectrometry test results, the Hospital's staff medically cleared Mora for discharge. Morance, made aware of this decision, then called defendant Rosemary McIntyre, the CWA caseworker assigned to the matter, and informed her of the medical clearance. After McIntyre

discussed the case with her supervisor, CWA decided that it would not seek custody of Mora. McIntyre then returned Morance's call, but was unable to reach her because she had left for the day. McIntyre successfully made contact with Morance the next day, April 8, 1993, and communicated to Morance CWA's conclusion [**9] that Mora could be discharged. Mora was released from the Hospital the same day, a day or two after the medical clearance had been given.

Neither CWA nor the Hospital ever discovered evidence of a danger of child abuse or neglect other than the initial test result and the Hospital medical staff's observations of the symptoms of methadone withdrawal in Mora. On June 5, 1993, the State Department of Social Services advised Kia P. that it had found "no credible evidence" that Mora had been abused or maltreated and that it considered the report of suspected child abuse or maltreatment to be "unfounded."

On February 16, 1994, Kia P., on behalf of her daughter and herself, brought this lawsuit in the United States District Court for the Eastern District of New York seeking damages and injunctive relief pursuant to 42 U.S.C. § 1983 and New York state law. The plaintiffs' complaint asserted seven causes of action: (1) that Mora was seized and removed from her parents' custody pursuant to Hospital and City policies in violation of the Fourth, Fifth and Fourteenth Amendments; (2) that the defendants conducted a "constitutionally inadequate" investigation because of [**10] inadequate training and supervision by the Hospital and the City; (3) that defendants Sabol, Little, McIntyre, Delamothe and the City (the "City defendants") violated New York state law by failing to provide services to preserve family integrity before removing Mora from her parents' custody, and by failing to reunite the family subsequent to Mora's removal; (4) that the defendants "unlawfully interfered with plaintiff's custody of her minor child"; (5) that the defendants unlawfully imprisoned Mora; [*754] (6) that the defendants' investigation deviated from the

standard of "reasonable care" as well as "accepted professional standards"; and (7) that the defendants discriminated against the plaintiffs because of Kia's HIV-positive status in violation of the Equal Protection Clause of the Fourteenth Amendment.

The defendants moved for summary judgment. The district court granted the motion, dismissing the complaint in its entirety. *See Kia P.*, 2 F. Supp. 2d at 295-96.

The district court first determined that Morance and the Hospital (the "Hospital defendants") acted under color of law and were state actors for purposes of the claims under § 1983. The court reasoned that [**11] although the Hospital defendants did not engage in state action "insofar as they provided medical care to Mora during her hospitalization," they did engage in state action when they held Mora for non-medical reasons pursuant to Hospital and CWA policies prohibiting the release of any child under CWA investigation without CWA permission. *See id. at 288.*

The district court next determined that the defendants did not infringe the plaintiffs' substantive due process rights under the Fourteenth Amendment. Applying the three-part test articulated by this Court in *Joyner v. Dumpson,* 712 F.2d 770, 777 (2d Cir. 1983), the district court ascertained, first, that both Kia and Mora had a constitutionally protected fundamental right to family integrity. *See Kia P.*, 2 F. Supp. 2d at 289. Second, the district court decided that this fundamental right was not "'significantly infringed'" because Kia was permitted to visit with Mora during Mora's hospitalization, including her feeding times. *Id. at* 290 (quoting *Joyner,* 712 F.2d at 777). Third, the district court found that the defendants had "a reasonable basis [**12] to believe that Mora was in danger of abuse or neglect." *Id*. Weighing these three factors, the district court held that the defendants had not engaged in action "that is arbitrary, conscience-shocking, or oppressive in a constitutional sense." 2 F. Supp. 2d at 289 (internal quotation marks omitted).

The district court also concluded that the defendants had not violated the plaintiffs' procedural due process rights under the Fourteenth Amendment. In the court's view, the initial test result indicating the presence of methadone in Mora's urine gave the defendants an adequate emergency basis for removing Mora from the custody of her parents without a pre-deprivation hearing. *See id. at* 291. The district court further held that there was no need for a post-deprivation hearing in light of (1) the low risk that the initial test result would be wrong and that the plaintiffs would, as a consequence, be erroneously deprived of their liberty interests, and (2) the minimal value that a post-deprivation hearing would have added while the confirmatory test-results were pending. *See id.*

Determining at the threshold that only Mora had standing to assert a Fourth Amendment claim, the district [**13] court rejected the argument that the testing of Mora's urine for purely medical reasons constituted a "search" within the meaning of the Fourth Amendment. *See id. at* 292. The plaintiffs do not appeal these determinations. The district court also held, however, that Mora was "seized" within the meaning of the Fourth Amendment when Kia was told that she was not free to take Mora home on March 29, 1993. Balancing the nature and quality of the intrusion on Mora's Fourth Amendment interests against the governmental interests at stake, the district court found that this seizure was "reasonable" and that Mora's Fourth Amendment rights therefore were not violated. *Id. at* 293.

The district court rejected in a more cursory fashion the plaintiffs' claimed right to an adequate child-abuse and neglect investigation. *See id.* This portion of the district court's judgment has not been appealed. [*755]

The district court also dismissed the plaintiffs' equal protection claim based on HIV discrimination because it was supported only by conclusory allegations. *See id.*

Finally, as to all constitutional violations, the district court concluded that the individual City defendants either were

[**14] not personally involved in the events in question (defendants Sabol and Little) or were entitled to qualified immunity (defendants Delamothe and McIntyre). *See id. at* 294-95. The plaintiffs do not appeal the dismissal of the claims against Sabol and Little, but they do challenge the district court's determination of qualified immunity for Delamothe and McIntyre. The district court held that Morance, the only individual Hospital defendant, had waived the defense of qualified immunity by failing to plead it in her answer. *See id. at 294 n.5.*

Because the district court had disposed of all federal claims, it exercised its discretion under 28 U.S.C. § 1367 (c)(3) to dismiss the plaintiffs' state law claims. *See id.* at 296. This appeal followed.

We now affirm the judgment of the district court but on the basis of a somewhat different analysis.

DISCUSSION

I. Standard of Review

We review the district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. *See Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir. 1999). Summary judgment is appropriate where "there [**15] is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). An issue of fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue of fact is "genuine"

if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

We may affirm the award of summary judgment on any ground with adequate support in the record. *See Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir. 2000); *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997) ("It is beyond cavil that an appellate court may affirm the judgment of the district court on any ground appearing in the record.")

II. State Action

"Section [**16] 1983 imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.'" *K & A Radiologic Tech. Servs., Inc. v. Commissioner of the Dep't of Health*, 189 F.3d 273, 280 (2d Cir. 1999) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997)). "The core purpose of § 1983 is 'to provide compensatory relief to those deprived of their federal rights by state actors.'" *Hardy v. New York City Health & Hosps. Corp.*, 164 F.3d 789, 795 (2d Cir. 1999) (quoting *Felder v. Casey*, 487 U.S. 131, 141, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988)). "Our first inquiry, therefore, is whether the actions alleged by the plaintiffs come within the definition of 'under color of' state law." *Carlos v. Santos*, 123 F.3d 61, 65 (2d Cir. 1997) (quoting 42 U.S.C. § 1983).

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer [**17] is clothed with the authority of state law." *Id.* (quoting, *inter alia*, *West* [*756] *v. Atkins*, 487 U.S. 42, 49, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988)) (other citations and internal quotation marks omitted). The Hospital is owned and administered by a private corporation; it is not a

state or municipal facility. The district court held, *see Kia P.*, 2 F. Supp. 2d at 288, the parties do not dispute, and we agree that insofar as the Hospital and its employees rendered medical care to Kia P. and her newborn daughter, the Hospital was therefore not a state actor. *See Blum v. Yaretsky*, 457 U.S. 991, 1011, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (holding that "decisions made in the day-to-day administration of a nursing home" do not constitute state action). Whatever misdeeds the Hospital defendants may have committed in providing that care -- if any there were -- they are not redressable under § 1983.

A. The Hospital's Failure to Release Mora Prior to April 7

Mora P. was born on March 27, 1993. Her urine tested positive for methadone and hospital doctors observed in her behavior symptoms of methadone withdrawal, including irritability [**18] and tremors. Because methadone withdrawal in an infant is a serious, sometimes fatal condition, the Hospital retained Mora for observation and treatment after it released her mother. Following a second attempt to confirm the test results using a sophisticated testing procedure, the first attempt having been inconclusive, the Hospital learned on April 6 or April 7 that the positive result of the Hospital's test for methadone had been in error. As a result of the laboratory report combined with the child's apparent good health some two weeks after her birth, she was given medical clearance for discharge. It was only after the medical clearance that the medical staff told Morance, the responsible Hospital social worker, that Mora was medically ready to leave the Hospital. These actions -- testing Mora's urine for methadone, holding and treating Mora for methadone withdrawal, and medically clearing Mora after the negative confirmatory test -- were taken by the Hospital in its capacity as a private provider of medical care and thus do not subject the Hospital to liability under § 1983. n2

n2 There is insufficient evidence in the record to support a finding that the Hospital's decision to hold Mora until she was medically cleared was made for CWA-related purposes and therefore constituted government action. Some evidence suggests that if the Hospital does not have concerns relating to the ability of a parent properly to care for an infant, there may be circumstances when, at least absent further action by the Hospital, that parent may take the child home despite "medical advice" to the contrary. That does not establish that absent CWA-related concerns, Mora would have been released to her mother at her mother's insistence despite Hospital doctors' concerns that Mora might be suffering from life-threatening methadone withdrawal. Such evidence thus does not establish state action by the hospital in retaining Mora pending her medical release.

[**19]

In addition to having a relationship with each of Kia P. and Mora P. as a provider of medical care, the hospital had a discrete and distinguishable role in the complex relationship among the State, the parent and the child in determining the safety and propriety of releasing Mora P. to the care of her mother. In the latter capacity, the Hospital defendants were required by statute to report the birth of Mora P., who initially tested positive for methadone and whose mother had a history of drug addiction, because it raised the specter of potential child abuse or neglect. There is evidence from which a jury could conclude that in addition to the Hospital's medical decision not to issue a release until April 6 or 7 pursuant to its medical relationship with Mora, it also put a hold on her release in its social welfare role because of its concern about her care in the hands of her mother. As the district court correctly found, insofar as the Hospital was acting in the latter capacity -- as part of the reporting and enforcement machinery

for CWA, a government agency charged with detection and prevention of child abuse and neglect -- the Hospital was a state actor.

> [*757] Conduct that [**20] is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action .... In certain instances the actions of private entities may be considered to be infused with "state action" if those private parties are performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties.

Perez v. Sugarman, 499 F.2d 761, 764-65 (2d Cir. 1974) (quoting *Evans v. Newton,* 382 U.S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)) (internal quotation marks omitted). But the refusal of the Hospital to release Mora to her mother for reasons relating to child abuse and child welfare laws did not become effective until the medical release was issued and Mora was no longer being held by the Hospital's doctors for treatment and observation, *i.e.*, on April 6 or April 7.

We conclude, therefore, that the Hospital's actions in its capacity as a state actor had no effect, and thus did not subject it to liability under § 1983, for the period between Mora's [**21] birth and her medical clearance. The plaintiffs' due process claim turns on whether the Hospital, acting in its role as an instrumentality of the government by holding Mora as part of the State's effort to detect and prevent child abuse, deprived Kia P. or her daughter of liberty without due process of law. The Hospital, treating Mora P. as its medical patient, did not declare her ready for release until April 6 or 7. Therefore, from the date of Mora's birth to April 6 or 7, whatever liberty interest Kia P. and Mora P. possessed was

being denied by the Hospital as a private actor providing medical care. The Hospital in its role as state actor during that period of time was incapable of depriving, and therefore did not deprive, mother and daughter of liberties that had already been taken away by the Hospital's medical staff as private, professional persons. n3

> n3 Our decision in this case turns in large part on our conclusion that the Hospital was not a state actor when it provided medical care to Mora. We need not address whether the Constitution prohibits a state-owned hospital from holding a child for medical reasons against a parent's wishes. Neither we nor the Supreme Court have heretofore marked the boundaries of a parent's right to control the medical treatment of his or her child, or a medical provider's ability to override a parent's medical decision. *See Defore v. Premore,* 86 F.3d 48, 50 (2d Cir. 1996) (declining to resolve these issues); *van Emrik v. Chemung County Department of Social Services,* 911 F.2d 863, 867 (2d Cir. 1990) (recognizing in dictum parents' constitutional liberty interest in having "a significant decision-making role concerning medical procedures sought to be undertaken by state authority upon their children").

[**22]

B. The Hospital's Failure to Release Mora between April 6 or 7 and April 8

Between Mora P.'s medical clearance on April 6 or 7 and her discharge to her mother's care on April 8, Mora was being held by the Hospital solely pending action by the CWA. The Hospital defendants were therefore behaving as state actors and may be held accountable under § 1983 for events occurring

during that period. Our conclusions with respect to state action necessarily limit our analysis of the alleged constitutional violations to the Hospital's actions after Mora's medical clearance on April 6 or April 7.

III. Due Process

A. Substantive Due Process.

Mora P.'s claim based on her detention at the Hospital "must be analyzed under the standard appropriate to the Fourth Amendment, not under the rubric of substantive due process." *Tenenbaum,* 193 F.3d at 600 (quoting *United States v. Lanier, 520 U.S. 259,* 272 n.7, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997)) (alteration in original). "Where another provision of the Constitution 'provides an explicit textual [*758] source of constitutional protection,' a court must assess a plaintiff's claims under that explicit [**23] provision and 'not the more generalized notion of "substantive due process."'" *Conn v. Gabbert,* 526 U.S. 286, 293, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999) (quoting *Graham v. Connor,* 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)). We therefore analyze Mora's detention claim under the Fourth Amendment in Part IV below.

But, like the parental plaintiffs in *Tenenbaum*, Kia P. "does not have -- or at least no longer alleges -- cognizable Fourth Amendment claims based on her daughter's ... removal." *Tenenbaum,* 193 F.3d at 600. Because Kia P.'s claims cannot be analyzed under any other more specific constitutional provision, we must assess them in terms of the Fourteenth Amendment's substantive due-process guarantee.

"For all its consequence, 'due process' has never been, and perhaps never can be, precisely defined." *Lassiter v. Department of Social Servs.,* 452 U.S. 18, 24, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981). However, "since the time of our early

explanations of due process, we have understood the core of the concept to be protection against arbitrary government action." *County of Sacramento v. Lewis,* 523 U.S. 833, 845, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998); [**24] *see also Tenenbaum,* 193 F.3d at 600 ("Substantive due-process rights guard against the government's 'exercise of power without any reasonable justification in the service of a legitimate governmental objective.'") (quoting *County of Sacramento,* 523 U.S. at 846).

The substantive due-process guarantee also "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 720, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997). We have described the interest of a parent in the custody of his or her children as "a fundamental, constitutionally protected liberty interest." *Gottlieb v. County of Orange,* 84 F.3d 511, 518 (2d Cir. 1996); *see also Tenenbaum,* 193 F.3d at 600 (observing that a family has, "in general terms, a substantive right under the Due Process Clause 'to remain together without the coercive interference of the awesome power of the state'") (quoting *Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977)); *Wilkinson v. Russell,* 182 F.3d 89, 103 (2d Cir. 1999) ("It has long [**25] been settled in this Circuit 'that a parent's interest in the custody of a child is a constitutionally protected liberty interest subject to due process protection.'") (quoting *Cecere v. City of New York,* 967 F.2d 826, 829 (2d Cir. 1992)) (alteration in original); *Duchesne,* 566 F.2d at 825 (describing right of family to remain together as "the most essential and basic aspect of family privacy"). No matter how important the right to family integrity, it does not automatically override the sometimes competing "compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Wilkinson,* 182 F.3d at 104 (internal quotation

marks omitted). As we said in *van Emrik v. Chemung County Department of Social Services,* 911 F.2d 863, 866 (2d Cir. 1990):

> Though a decision to remove a child from parental custody implicates the constitutional rights of the parents, it obliges protective services caseworkers to choose between difficult alternatives in the context of suspected child abuse. If they err in interrupting [**26] parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights.
>
> Recognizing the need for "unusual deference in the abuse investigation context," we have held that an investigation will "pass constitutional muster provided simply that case workers have a 'reasonable [*759] basis' for their findings of abuse."

Wilkinson, 182 F.3d at 104 (quoting *van Emrik,* 911 F.2d at 866).

Because of our holding regarding state action, the Hospital did not hold Mora in its capacity as a state actor until after the primary evidence of abuse had been discredited, when the drug test indicated the absence of methadone in Mora's urine and she was medically cleared for release. We conclude, however, that the Hospital's decision to hold Mora thereafter while it informed CWA of the test result and waited for a response was a decision not without a "reasonable basis," *Wilkinson,* 182 F.3d at 104, or "without any reasonable justification in the service of a legitimate governmental objective," *Tenenbaum,* [**27] (quoting *County of Sacramento,* 523 U.S. at 846). We think the Constitution allows the CWA a short time -- a day or two in this case -- to process the new information provided by the test results, to review Mora's case in light of this new

information, to decide whether to authorize Mora's release, and to communicate its decision to the Hospital. The Hospital's holding of Mora pending the outcome of this deliberative process is a reasonable accommodation of the state's compelling interest in protecting children from abuse and neglect. As a matter of law, Kia P.'s rights to substantive due process were not abridged.

A. Procedural Due Process.

For purposes of procedural due process analysis, parents have "a constitutionally protected liberty interest in the care, custody and management of their children," *Tenenbaum,* 193 F.3d at 593 (citing cases), and children have a parallel constitutionally protected liberty interest in "not being dislocated from the 'emotional attachments that derive from the intimacy of daily family association,'" *Duchesne,* 566 F.2d at 825 (quoting *Smith v. Organization of Foster Families for Equality & Reform,* 431 U.S. 816, 844, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977)). [**28] The State also has "a profound interest in the welfare of the child." *Tenenbaum,* 193 F.3d at 593-94. The question then is: What procedures must be afforded to a parent when the coercive power of the State seeks to separate them?

The Supreme Court has indicated that the answer generally depends on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would

entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); accord, e.g., *Zinermon v. Burch,* 494 U.S. 113, 127, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990). Procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases." *Matthews v. Eldridge,* 424 U.S. at 344; accord *Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 321, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985); [**29] *Santosky v. Kramer,* 455 U.S. 745, 757, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); *Mackey v. Montrym,* 443 U.S. 1, 14, 61 L. Ed. 2d 321, 99 S. Ct. 2612 (1979); *Parham v. J.R.,* 442 U.S. 584, 612-13, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979). In other words, the requirement of a hearing or other procedural safeguard typically will not depend on the quantum of evidence possessed by the government in any one particular case.

This Court, in a substantial line of cases, has addressed the standards by which a state actor is measured for due process purposes when he or she removes a child from a parent's custody in the interests of the safety of the child. *See, e.g., Tenenbaum,* 193 F.3d at 593-95, and cases cited [*760] therein. But the situation of Kia P. and her daughter was different. Mora was not taken from Kia. Kia placed her child in the care of a non-governmental actor for medical care when she gained admission to the Hospital and gave birth there. It was while Mora was under that care, after she had been medically cleared, that the Hospital defendants, acting for the State, held her for an additional day or two while it sought [**30] CWA advice as to her release.

Kia P.'s claims are therefore covered by a subset of our cases addressing circumstances where the government, although not physically taking the child away from a parent, gains custody of the child by refusing to release him or her after the parent has voluntarily granted temporary custody to

the government or a third party. Such situations unquestionably also implicate the parent and child's procedural due process rights. *See Cecere,* 967 F.2d at 830 (holding that when parent voluntarily leaves child with third party, and third party later refuses to return child to parent on basis of State authority, parent is deprived of constitutionally protected liberty interest in custody of her child at moment of refusal to return that child); *Duchesne,* 566 F.2d at 822-23, 828 (holding that even though mother voluntarily left children with neighbor, when State officials assumed custody of children from neighbor and refused to return children to mother, such officials were required to initiate post-deprivation proceeding); cf. *Joyner,* 712 F.2d at 782-83 (holding that parents who voluntarily relinquished children [**31] to State nonetheless possessed substantive due process rights with respect to State's later refusal to return children and State's practice of "strictly controlling visitation, thereby isolating the child and straining familial bonds").

The rule in this Circuit is that under these circumstances the State has the duty to initiate a "prompt" post-deprivation hearing after the child has been removed from the custody of his or her parents. *See Gottlieb,* 84 F.3d at 520. n4 In other words, "in those 'extraordinary' situations, where deprivation of a protected interest is permitted without prior process, the constitutional requirements of notice and opportunity to be heard are not eliminated but merely postponed." *Duchesne,* 566 F.2d at 826 (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)). Because, among other things, the state actor ordinarily "has a far greater familiarity with the legal procedures available for testing its action," "the burden of initiating judicial review must be shouldered by the government," *id.* 566 F.2d at 828. We must therefore resolve whether the plaintiffs were denied a "prompt" [**32] post-deprivation hearing in this case.

n4 A pre-deprivation hearing, which is required in non-emergency situations, *see Tenenbaum, 193 F.3d at 594,* would have been extremely impractical in this case, because the Hospital already had custody of Mora at the moment she was medically cleared. At that point, the Hospital's custody of Mora became state action and a pre-deprivation hearing was no longer possible.

We hold that as a matter of law they were not. Shortly after Mora was cleared medically by the Hospital's staff, Morance called McIntyre, the CWA caseworker, and reported the clearance. McIntyre discussed the case with her supervisor who, in consultation with McIntyre, decided to give the Hospital permission to release Mora to her parents. McIntyre then returned Morance's call. Unable to reach her that day, McIntyre successfully made contact with Morance the following day, April 8, 1993. McIntyre told Morance that as far as CWA was concerned, Mora could be discharged. Mora was released [**33] from the Hospital the same day, a day or two after the medical clearance had been given. Failure of the Hospital defendants to obtain a hearing during that short period did not violate the rule that a hearing be held promptly, especially in light of the fact that the time was [*761] used by the CWA to decide promptly whether to release Mora after it received news of the drug test showing an absence of methadone. n5 In *Cecere* we held that certain emergency conditions permitted the deprivation of a parent's custody of her child over a four-day period including a weekend and two weekdays. *See Cecere,* 967 F.2d at 830. In other words, we held that emergency circumstances justified an immediate removal of the child from her parent, and that a four-day delay without a post-deprivation hearing was constitutionally permissible. *Cecere* differs from the case at bar inasmuch as the child in *Cecere* was separated from her mother because of evidence of abuse. It nonetheless indicates the amount of

breathing room that we think the law allows child welfare officials to permit them to determine what action should be taken after parent and child have been separated.

n5 We note, as did the plaintiffs in their principal brief on appeal, that under New York state law a hospital may detain an infant without court order until the next weekday. *See* N.Y. Social Servs. Law § 417(2) (stating that when hospital holds child for emergency reasons, it should notify local child protective service, which in turn shall initiate a child protective proceeding in the family court "at the next regular weekday session" if it wishes to retain custody of the child); N.Y. Family Court Act § 1024(a) (permitting temporary deprivation of custody without court authorization only if "there is not enough time to apply for an order"); N.Y. Comp. Codes R. & Regs. tit. 18, § 432(o) ("Upon notification that a child is retained in protective custody, the child protective service shall commence a proceeding at the next regular weekday session of the appropriate Family Court, or recommend to the court at that time that the child be returned to his parents or guardian."); Memorandum of 6/3/91 from Robert L. Little, Executive Deputy Commissioner of CWA, and Barry Ensminger, General Counsel, Office of Legal Affairs, to all CWA and Office of Legal Affairs staff, at 2 ("Holds of children in the hospital directed by CWA staff are the equivalent of emergency removals. No such removals may continue more than 24 hours (or until the next regular court day) without court authorization."); CWA, Child Protective Services Field Operations Manual issued 12/15/91, ch. 6, at 3 ("The caseworker must go to Family Court within 24 hours or the next working day to file a petition.").

[**34]

We underscore what should be plain from the foregoing discussion: Had Kia P. been held by the Hospital solely for purposes of protecting the child from possible abuse or improper parental care for the entire ten days during which parent and child were kept apart, without a hearing and a court order permitting their enforced separation, there is a serious danger that the Hospital defendants would have violated the plaintiffs' procedural due process rights. As a state actor under those circumstances, the Hospital defendants could have been held liable to the plaintiffs under § 1983 for any such violation.

Finally, we note that there is no evidence that CWA or any of its employees proximately caused Mora to be kept from her parents without a hearing. No CWA employee ever directed the Hospital to hold Mora against her parents' wishes pending the CWA investigation. And while the CWA had a policy prohibiting hospitals from releasing children under CWA investigation without CWA permission, there is no evidence that Mora was detained pursuant to that policy. Because there is no genuine issue of material fact as to whether the City defendants proximately caused the alleged violation of the [**35] plaintiffs' procedural due process rights to a prompt post-deprivation hearing, those defendants would be entitled to summary judgment in any event. *See Gierlinger v. Gleason,* 160 F.3d 858, 872 (2d Cir.1998) ("In all § 1983 cases, the plaintiff must prove that the defendant's action was a proximate cause of the plaintiff's injury.").

IV. Fourth Amendment

With respect to the plaintiffs' claim under the Fourth Amendment, as applied to the States under the Fourteenth Amendment, the district court held that only Mora, and not her mother, had standing to assert a claim, that Mora was not "searched" within the meaning of the Fourth Amendment when the Hospital examined [*762] her urine, and that Mora was not

subject to an unreasonable "seizure" in violation of the Fourth Amendment when she was kept from her parents' custody. *See Kia P.*, 2 F. Supp. 2d at 292-93. The plaintiffs appeal only the last of these determinations. n6

> n6 They also argue that Mora was entitled under the Fourth Amendment to a post-seizure hearing. Because the plaintiffs did not raise this issue below, we decline to consider it. *See Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994)* (noting general rule that issues may not be raised for first time on appeal, and that choice to invoke one of the exceptions to this general rule "is discretionary with the panel hearing the appeal").

[**36] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. We have observed that the Fourth Amendment applies in the context of the seizure of a child by a government-agency official during a civil child-abuse or maltreatment investigation. *See Tenenbaum,* 193 F.3d at 602. And there is no doubt that Mora's retention by the Hospital was a "seizure" within the meaning of the Fourth Amendment. A "seizure" occurs where, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (plurality opinion of Stewart, J.); *accord Michigan v. Chesternut,* 486 U.S. 567, 573, 100 L. Ed. 2d 565, 108 S. Ct.

1975 (1988). Although the usual phrasing of the [**37] seizure test is difficult to apply here -- Mora P. is unlikely to have had a "belief" as to whether or not she was free to leave the Hospital -- Kia P. was told in no uncertain terms that she could not take Mora home from the Hospital. It was clear to Kia P., if not to Mora, that Mora was not free to leave. Because of our conclusion that the Hospital was not a state actor until Mora was medically cleared on April 6 or 7, however, Mora's § 1983 claim implicates the actions of the Hospital only after Mora's medical clearance. Mora was therefore "seized" within the meaning of the Fourth Amendment only after she was medically cleared but not released from the Hospital's custody.

In *Tenenbaum,* we declined to decide which of three modes of determining whether a seizure was "reasonable" under the Fourth Amendment should apply in cases where the state seizes a child in order to prevent abuse or neglect. Whether such a seizure requires probable cause, or whether it is subject to a "less stringent reasonableness requirement" due to the "special needs" of child protection agencies, or whether a seizure must be justified by "exigent circumstances" was unnecessary to our decision because [**38] all three analyses supported our holding that the seizure in that case was constitutional. *Tenenbaum,* 193 F.3d at 603-05. We need not and therefore do not address the issue in this case either.

The seizure in this case is unusual because the Hospital had physical custody of Mora both before and after the seizure. It occurred when the perceived danger of harm to Mora from her medical condition ended. Custody then passed from the Hospital as private actor to the Hospital as state actor, as it continued to hold her briefly to determine whether any action should be taken with respect to possible danger of parental abuse. We conclude, for substantially the same reasons that militate against our finding of a due process violation, that the Hospital's short-term custody of Mora pending its report of the negative drug-test result and medical clearance to CWA and

CWA's subsequent deliberation about whether to hold Mora [*763] was reasonable. Indeed, it would have put the Hospital defendants in an impossible position to have required them to decide whether further action and its attendant legal proceedings were advisable without allowing them some time in which to make that decision. [**39] Because the Hospital defendants' brief seizure of Mora P. while they were state actors was "reasonable," it did not violate the Fourth Amendment.

The district court properly granted summary judgment on the plaintiffs' Fourth Amendment claim.

V. HIV Discrimination

The district court dismissed the plaintiffs' claims of HIV discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment on the ground that the plaintiffs had offered only conclusory allegations that the defendants' actions had "anything to do with" Kia's HIV-positive status. *Kia P.*, 2 F. Supp. 2d at 293. On appeal, the plaintiffs dispute this characterization of the evidence.

While the plaintiffs describe a litany of disturbing events, all but one of them arose exclusively from the Hospital's medical treatment of Kia P. and her daughter. The Hospital was neither engaged in state action nor acting under color of law when it performed those acts. Thus, no defendant, including the Hospital defendants, may be held liable under § 1983 for alleged discrimination arising out of the plaintiffs' medical treatment at the Hospital.

All that remains is the plaintiffs' claim that the [**40] Hospital refused to release Mora because Kia P. was HIV-positive. She has offered no evidence from which a reasonable trier of fact could infer that this was the reason for the Hospital's actions. A plaintiff may not survive a properly asserted motion for summary judgment on the basis of

conclusory allegations alone. *See Finnegan v. Board of Educ.*, 30 F.3d 273, 274 (2d Cir. 1994).

We therefore affirm the grant of summary judgment on the plaintiffs' equal protection claim.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

CONCUR:

VAN GRAAFEILAND, Senior Circuit Judge,
I concur in the result.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KIA P., individually and on behalf of MORA P., an infant,

Plaintiffs,

-against-

ROSEMARY McINTYRE, individually and as caseworker, Child Welfare Administration, DOREN DELAMOTHE, individually and as supervisor, Child Welfare Administration, BARBARA SABOL, individually and as Commissioner of the Social Services of the City of New York, ROBERT LITTLE, individually and as Deputy Commissioner of Social Services of the City of New York, CITY OF NEW YORK, LONG ISLAND COLLEGE HOSPITAL, and SUSAN MORANCE,

Defendants.

SECOND AMENDED JUDGEMENT
94-CV-664 (FB)

A memorandum and order of Honorable Frederick Block, United States District Judge, having been filed on April 17, 1998, granting the defendants' motions for summary judgement in respect to all of the plaintiffs' expressed first, second, fourth and seventh federal claims; declining to exercise supplemental jurisdiction over

the plaintiffs' state law claims; dismissing the plaintiffs' complaint in its entirety; and by Stipulation and Order of Dismissal dated October 14, 1998; dismissing as moot the cross-claims; it is

ORDERED and ADJUDGED that plaintiffs' take nothing of the defendants'; that the defendants' motions for summary judgement on the first, second, fourth and seventh federal claims are granted; that the court declines to exercise supplemental jurisdiction over the plaintiffs' state law claims; that the cross-motions are dismissed as moot; and, that the plaintiffs' complaint is dismissed in its entirety.

Dated: Brooklyn, New York
October 30, 1998

/s/
ROBERT C. HEINEMANN
Clerk of Court

KIA P., individually and on behalf of MORA P., an infant, Plaintiffs, -against- ROSEMARY McINTYRE, individually and as caseworker, Child Welfare Administration, DOREN DELAMOTHE, individually and as supervisor, Child Welfare Administration, BARBARA SABOL, individually and as Commissioner of Social Services of the City of New York, ROBERT LITTLE, individually and as Deputy Commissioner of Social Services of the City of New York, CITY OF NEW YORK, LONG ISLAND COLLEGE HOSPITAL, and SUSAN MORANCE, Defendants.

Case No. 94-CV-0664 (FB)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2 F. Supp. 2d 281; 1998 U.S. Dist. LEXIS 5485

April 15, 1998, Decided

DISPOSITION:

[**1] Defendants' motions for summary judgment in respect to all of plaintiffs' expressed federal claims, namely, their first, second and seventh claims granted. Plaintiffs' complaint dismissed in its entirety.

OPINION:

[*284] MEMORANDUM AND ORDER

BLOCK, District Judge:

In this action, which arises under 42 U.S.C. § 1983 and New York state law, plaintiff Kia P. ("Kia") claims that she

was unconstitutionally deprived of the custody of her daughter Mora P. ("Mora") n1 shortly after her birth at Long Island College Hospital ("Hospital") in 1993, when the Hospital, allegedly pursuant to directions from employees of the City of New York ("City"), held Mora for ten days pending its receipt [**2] of the results of a toxicology screen of the baby's urine. Kia alleges that the City and its employees have implemented a policy of removing [*285] children from their parents upon suspicion of child abuse without probable cause or due process of law, in violation of the Fourth and Fourteenth Amendments of the Constitution. Pending before the Court are two summary judgment motions pursuant to Rule 56 of the Federal Rules of Civil Procedure. One has been brought by defendants City, Rosemary McIntyre ("McIntyre"), Doren Delamothe ("Delamothe"), Barbara Sabol ("Sabol"), and Robert Little ("Little") (collectively "the City defendants"). The other has been brought by the Hospital and Susan Morance ("Morance") (collectively "the Hospital defendants"). Because the Court concludes that none of the defendants violated plaintiffs' constitutional rights, the motions for summary judgment are granted and the complaint is dismissed. As alternative grounds for dismissal, in respect to the individual City defendants, the Court holds that they are immune from liability, either because they were not personally involved in the constitutional violations alleged to have occurred or by virtue of the doctrine of [**3] qualified immunity.

N1 In the absence of any definitive statement regarding the correct spelling of her first name, the Court will refer to her by the name chosen for the caption of this lawsuit.

BACKGROUND

The Court's recitation of the facts is drawn from the Statements of Undisputed Facts submitted by the parties pursuant to Local Rule 56.1 (formerly Local Rule 3(g)) and the documentary evidence contained in their motion papers. Unless otherwise indicated, the facts are undisputed.

On March 27, 1993, Kia went to the Hospital in labor, and Mora was born later that day. Kia had received prenatal care through a program at North Central Bronx Hospital. Kia informed Hospital personnel upon admission that she was HIV positive. Kia alleges that she was treated discourteously as a result of her HIV status.

Shortly after Mora's birth, the Hospital took a sample of Mora's urine, which tested positive for methadone. [**4] On March 29, 1993, defendant Morance, a Hospital social worker, informed Kia of the positive test results. Kia denied having taken methadone during her pregnancy. As was its practice, the Hospital thereupon sent Mora's urine sample to an outside laboratory for confirmatory testing. The record reflects it was "very rare" for confirmatory tests to fail to detect the presence of drugs in a urine sample. Reply Declaration of Steven Friedman at Exh. "A." Kia was released from the Hospital on March 29, 1993. However, the Hospital continued to hold Mora pending the anticipated urine test confirmation. Moreover, there is undisputed evidence in the record that an infant's methadone withdrawal can take a minimum of one week to manifest itself. Hospital records indicate that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal.

Also on March 29, 1993, Morance reported the positive urine toxicology screen to the New York State Central Register of Child Abuse and Maltreatment ("Central Register"), which in turn notified the Child Welfare Administration ("CWA"). Defendant McIntyre was the caseworker assigned by CWA to investigate the matter. On March [**5] 30, 1993, she visited Kia's home in Brooklyn and interviewed Kia and her husband,

Edwin, since deceased. Kia denied having used drugs during her pregnancy or having participated in a methadone program, although she admitted to having habitually used crack cocaine, but not during the past two years. Edwin similarly denied having used any illegal drugs for the past two years. McIntyre kept in contact with the Hospital, telephoning Morance on March 31, 1993 to inform her that Kia had adamantly denied using drugs during her pregnancy. Morance advised McIntyre that the baby's urine sample had been sent out for confirmatory testing, and that the results were expected by April 5, 1993. Defendant Delamothe, one of McIntyre's supervisors, denied that CWA ever told the Hospital to place a "hold" on Mora's release. However, Cyprian Belle, a deputy director of the City's Agency for Children's Services, testified at his examination before trial that CWA had a policy in 1993 that a child who was the subject of a pending CWA investigation could not be released from a hospital until CWA gave its permission.

The confirmatory testing of Mora's urine was delayed because SmithKline Beecham, the laboratory [**6] to which the sample was initially sent, was unable to complete the [*286] screening due to the small quantity of urine in the sample. The sample was consequently sent to National Medical Services for analysis by gas chromatography/mass spectrometry ("GCMS"), a more sophisticated test than the test conducted by the Hospital. In the meantime, according to Hospital records, Hospital personnel continuously monitored Mora in order to determine whether she was suffering from methadone withdrawal. It is uncontested that while Mora remained in the Hospital, Kia was permitted to, and did, visit Mora, including during feeding times.

Ultimately, National Medical Services reported that it could not confirm the presence of methadone in the baby's urine. There is some dispute in the record as to whether the Hospital received these tests results on April 6 or 7, 1993. In any event, Mora's doctors cleared her for discharge on April 7, 1993, and

this information was forthwith communicated to Morance. Morance promptly contacted McIntyre to advise her that Mora had been medically cleared for discharge. CWA determined that it did not intend to take any action in respect to Mora's case, and this information [**7] was communicated to the Hospital on April 8, 1993. Mora was discharged from the Hospital on that day. By letter dated June 5, 1993, the State Department of Social Services advised Kia that no credible evidence had been found that Mora had been abused or maltreated, and all identifying information was expunged from the Central Register. This action followed.

Plaintiffs' complaint invokes all of the provisions of the Constitution which arguably impact upon the separation of a child from the custody and care of a parent, as well as related New York State law provisions. They are contained in seven claims: *first*, that defendants City, Sabol, as Commissioner of the City's Department of Social Services, Little, as Deputy Commissioner of the Department of Social Services and the Director of the CWA, and the Hospital had a policy of detaining children without due process of law or probable cause, and that defendants McIntyre, Delamothe and Morance removed Mora from Kia's custody pursuant to this policy in violation of plaintiffs' rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution; n2 *second*, that defendants conducted a constitutionally inadequate [**8] investigation of the charges against Kia and that the removal of Mora from Kia's custody was based upon this inadequate investigation; *third*, that defendants failed to provide services mandated by New York State law to reunite Kia and Mora; *fourth*, that defendants unlawfully interfered with Kia's custody of Mora; *fifth*, that defendants unlawfully imprisoned Mora; *sixth*, that defendants' inadequate investigation of the charges against Kia constituted a gross breach of duty and a gross deviation from accepted

professional standards; and *seventh*, that defendants discriminated against Kia because of her HIV status.

> n2 The Fifth Amendment applies only to the federal government; therefore, allegations of "federal action" are required to state a claim for deprivation of due process in violation of the Fifth Amendment. *See Flowers v. Webb,* 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983). There are no such allegations in this case. Apparently in recognition of this legal principle, plaintiffs confine their arguments in opposition to the summary judgment motions to defendants' alleged violations of their constitutional rights under the Fourth and Fourteenth Amendments.

[**9]

The City defendants contend that: (1) they did not violate plaintiffs' due process rights; (2) plaintiffs had no constitutional right to an adequate investigation; (3) plaintiffs' claim that the City defendants failed to provide statutorily-mandated preventive services fails to state a claim for which relief may be granted; (4) plaintiffs have failed to demonstrate the existence of a municipal policy, practice or custom; (5) the individual City defendants are immune from liability based upon the law of qualified immunity; and (6) the Court should decline to exercise supplemental jurisdiction over the state law claims.

The Hospital defendants contend that: (1) the Hospital is not a state actor for purposes of liability under § 1983; (2) plaintiffs have no constitutional right to an adequate child abuse investigation; (3) the state law claims should be dismissed; and (4) the seventh claim for relief, based upon unlawful discrimination, should be dismissed based upon plaintiffs' failure to offer any factual basis for this claim.

[*287] Plaintiffs counter that: (1) disputed questions of

fact preclude an award of summary judgment; (2) by interfering with Kia's liberty interest in the care [**10] and custody of Mora, defendants violated plaintiffs' rights to substantive due process; (3) by detaining Mora without a hearing, defendants deprived plaintiffs of their right to procedural due process; (4) the Fourth Amendment protection against unreasonable searches and seizures applies to this case; (5) qualified immunity is not appropriate because of contested issues of material fact; (6) the Court should continue to exercise jurisdiction over the state law claims, which, in any event, are not ripe for dismissal; and (7) the Hospital is a proper party under § 1983.

DISCUSSION

I. Standard on a Motion for Summary Judgment

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden is on the moving party to identify those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits that it believes demonstrate the absence of a genuine issue of material [**11] fact. *See Celotex Corp., supra,* at 323. All ambiguities must be resolved, and all inferences drawn, in favor of the non-moving party. *See Repp v. Webber,* 132 F.3d 882, 889 (2d Cir. 1997). The judge's role in reviewing a motion for summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *see also Beatie v. City of New York,* 123 F.3d 707, 710-711 (2d Cir. 1997). Once

the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts .... The non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), quoting Fed. R. Civ. P. 56(e) (emphasis in original) (other citations omitted).

II. 42 U.S.C. § 1983

It is well established that the elements of a claim under § 1983 are: (1) that the conduct in question deprived a person of rights, [**12] privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under color of state law. *See Gomez v. Toledo,* 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)*; Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

Because "section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred[,]' ... the first step in any such claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver,* 510 U.S. 266, 271, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (quoting *Baker v. McCollan,* 443 U.S. 137, 144 n.3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979)). However, this inquiry presupposes that the § 1983 defendant acted under color of state law. "A private defendant may be held liable only as 'a willful participant in joint activity with the State or its agents.'" *Spear v. Town of West Hartford,* 954 F.2d 63, 68 (2d Cir. 1992) (quoting *Adickes,* 398 U.S. at 152). In this case, the Hospital defendants argue as a threshold matter that [**13] they are not proper parties to this § 1983 action because they are not state actors. Thus, before turning to a

consideration of plaintiffs' constitutional claims, the Court first examines whether the Hospital defendants are state actors who may be subject to liability under § 1983.

A. Are the Hospital Defendants "State Actors"?

There is some support for the Hospital's contention that a hospital providing medical services is ordinarily not a state actor under § 1983, even when the action at issue is the hospital's notification to government [*288] officials of suspected child abuse. *See Deckon v. Chidebere,* 1995 U.S. Dist. LEXIS 13544, 1995 WL 555684, at *4 (S.D.N.Y. Sept. 19, 1995), *aff'd*, 101 F.3d 1393 (2d Cir. 1996); *Thomas v. Beth Israel Hosp., Inc.,* 710 F. Supp. 935, 940 (S.D.N.Y. 1989). However, there is also ample authority to the effect that "joint interference of state agents and private parties with private rights constitutes state action attributable to both public and private sector participants." *Suss v. American Soc'y for the Prevention of Cruelty to Animals,* 823 F. Supp. 181, 186 (S.D.N.Y. 1993); *see also Perez v. Sugarman,* 499 F.2d 761, 764-65 (2d Cir. 1974); *Koltz* [**14] *v. Bezmen,* 822 F. Supp. 114, 117 (E.D.N.Y. 1993); *Ruffler v. Phelps Memorial Hosp.* 453 F. Supp. 1062, 1067 (S.D.N.Y. 1978). As the Second Circuit stated in *Perez*:

> Conduct which is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action .... In certain instances the actions of private entities may be considered to be infused with "state action" if those private parties are performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties.

Perez, 499 F.2d at 764-65 (2d Cir. 1974) (quoting *Evans v. Newton,* 382 U.S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)).

The Court agrees with the Hospital that insofar as its employees provided medical care to Mora during her hospitalization, it did not engage in state action that would subject it to liability under § 1983. However, the Hospital did more than simply treat Mora. Morance testified at her examination before trial that once a case has been referred to CWA, the Hospital [**15] will not release a child, even if he or she has been medically cleared for release, without the prior approval of CWA. Morance's testimony is corroborated by the Hospital's Policy and Procedure Manual, which provides, in pertinent part, that if the Central Register accepts a case and refers it to the local CWA office, as here, "the [Hospital] social worker will so document in the chart and the child will be admitted and held pending the outcome of the local CWA's field unit's investigation." Plaintiffs' Answering Submissions at Exh. "C." Finally, as noted above, CWA apparently had a policy in 1993 that it had to approve a child's release from a hospital if the child was the subject of an ongoing investigation. It is apparent, therefore, that in 1993, the Hospital had implemented a policy of holding children who were the subject of child abuse investigations, even if there was no medical reason for doing so, until it received notification from the CWA that its investigation was complete. Under those circumstances, the Court determines that the Hospital and its employees were performing a function that was essentially public in nature. But for the actions of the Hospital in holding [**16] Mora, the CWA presumably would have needed to take some action to detain the child pending completion of its investigation or would have needed to determine on an expedited basis whether she should have been released to Kia. Accordingly, the Court determines that the Hospital's practices

in this regard were sufficiently "entwined" with City policy to warrant its being treated as a state actor for purposes of this action. *See Perez,* 499 F.2d at 765. The Court, therefore, rejects the Hospital defendants' claim that they are not proper parties to this § 1983 action, and will accordingly determine whether their actions in detaining Mora, together with the actions of the City defendants, violated plaintiffs' constitutional rights.

B. Have the Plaintiffs' Constitutional Rights Been Violated?

Plaintiffs specifically invoke the Constitution in respect to their first, second, and seventh claims. In their first claim, plaintiffs claim that defendants infringed their rights to substantive and procedural due process under the Fourteenth Amendment and Mora's right to be free from unreasonable searches and seizures under the Fourth Amendment. In their second claim, plaintiffs assert [**17] that defendants violated their alleged constitutionally-protected right to an adequate child abuse investigation. In plaintiffs' seventh claim, they allege that defendants discriminated against them because of Kia's HIV status, in violation of the Equal [*289] Protection Clause of the Fourteenth Amendment. Although plaintiffs' fourth claim, alleging defendants' interference with Kia's custody of Mora, does not specifically invoke the Constitution, it does appear to raise identical constitutional concerns as are implicated in plaintiffs' first claim. The Court will consider each of these constitutional contentions in turn.

As a preface to the Court's treatment of plaintiffs' Fourteenth Amendment substantive and procedural due process claims and their Fourth Amendment search and seizure claims, it is conceptually important to recognize that they are all triggered by the liberty interests implicated whenever the state intrudes upon "the most essential and basic aspect of familial privacy -- the right of the family to remain together without the coercive interference of the awesome power of the state."

Duchesne v. Sugarman, 566 F.2d 817, 824 (2d Cir. 1977); *see also Joyner v. Dumpson,* [**18] 712 F.2d 770, 777-78 (2d Cir. 1983); *Zappala v. Albicelli,* 954 F. Supp. 538, 544 (N.D.N.Y. 1997); *Tenenbaum v. Williams,* 862 F. Supp. 962, 969 (E.D.N.Y. 1994). Consequently, "parents have a fundamental, constitutionally protected liberty interest in the custody of their children." *Gottlieb v. County of Orange,* 84 F.3d 511, 518 (2d Cir. 1996). This liberty interest does not belong exclusively to parents. Rather, "this right encompasses both a parental interest in the companionship, custody, and care of the children and those 'of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.'" *Defore v. Premore,* 863 F. Supp. 91, 94 (N.D.N.Y. 1994), *aff'd,* 86 F.3d 48 (2d Cir. 1996) (quoting *Duchesne,* 566 F.2d at 825).

1. Due Process

a. Substantive Due Process

While the Supreme Court has recently explained that "'as a general matter ... [it] has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended,'" it has, nonetheless, steadfastly recognized that "the protections [**19] of substantive due process have ... been accorded to matters relating to marriage, family, procreation and the right to bodily integrity." *Albright, 510 U.S. at 271-72* (quoting *Collins v. Harker, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992)).* Consequently, "freedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974).*

"Substantive due process protects against government

action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.'" *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (quoting *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994)). In *Joyner v. Dumpson* and *Gottlieb v. County of Orange, supra*, both of which involved the exercise of parental rights, the Second Circuit conflated the substantive due process analysis into a balancing of the liberty interests subsumed by the special nature of the parent-child relationship against the state's [**20] interest in protecting the child's health and safety. In *Joyner*, the court applied a three-part test to determine whether certain provisions of New York's Social Services Law infringed plaintiffs' custody rights. *See also Tenenbaum*, 862 F. Supp. at 969 (applying same three-part test to claim that removal of child violated parents' right to substantive due process). First, the court identified the interest at stake in order to determine whether the interest constituted a "fundamental right" for purposes of the Fourteenth Amendment. Second, the court looked to whether the state's action had "significantly infringed" the fundamental right. *Joyner*, 712 F.2d at 777. Finally, the court looked to whether an important state interest justified the infringement. In *Gottlieb*, the Second Circuit, while not expressly invoking the three-part test relied upon in *Joyner*, essentially engaged in the same inquiry, looking first to the nature of the parent's right to custody, and then observing that this right must give way when "there is an objectively reasonable basis for believing that parental [*290] custody constitutes a threat to the child's health or safety." *Gottlieb*, 84 F.3d [**21] at 511. This governmental concern derives from "'the interest of the State in protecting and caring for children who are being neglected.'" *Dietz v. Damas*, 932 F. Supp. 431, 450 (E.D.N.Y. 1996), *reargument granted and decision aff'd*, 948 F. Supp. 198 (E.D.N.Y. 1996) (quoting *Newton v. Burgin*, 363 F. Supp. 782, 786 (W.D.N.C. 1973) (three-judge panel), *aff'd*, 414 U.S. 1139,

39 L. Ed. 2d 96, 94 S. Ct. 889 (1974)). Accordingly, the Court analyzes plaintiffs' substantive due process claims in accordance with the framework employed in *Joyner* and conceptually embraced in *Gottlieb*.

The Court determines, as a matter of law, that plaintiffs' rights were not "significantly infringed" by the defendants' actions. CWA took no formal action to take custody of Mora from Kia. Rather, the nature of the limitation upon Kia and Mora's rights was limited to a "hold" on Mora's discharge pending an anticipated confirmation of the toxicology results and the sensible need to observe Mora for withdrawal symptoms. Notably, Kia was permitted to visit with Mora for the duration of Mora's hospitalization, including feeding times. Moreover, and most significantly, the results of the initial [**22] toxicology screen, taken together with Kia's history of substance abuse, gave the Hospital and CWA a reasonable basis to believe that Mora was in danger of abuse or neglect, and clearly justified their limited actions. Plaintiffs' argument that the screening test used by the Hospital was not "state of the art" does not in any way compel the conclusion that the defendants' fears for Mora's health and welfare were not reasonable. Although it is uncontested that the GCMS testing used by the outside laboratories was more accurate, there is, as noted above, uncontested evidence in the record that the Hospital routinely sent samples for confirmation whenever the mother denied having used drugs during pregnancy, and that, even in 1993 when the test at issue was administered, it was very rare for urine tests sent to outside laboratories for confirmation not to come back positive.

As the Second Circuit aptly observed in *Van Emrik v. Chemung County Dep't of Social Servs.*, 911 F.2d 863, 866 (2d Cir. 1990):

> Though a decision to remove a child from parental custody implicates the constitutional rights of the

> parents, it obliges protective services caseworkers to choose between difficult [**23] alternatives in the context of suspected child abuse. If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights.

Given the delicacy of this balance, the Court concludes that the limited nature of the infringement upon plaintiffs' respective familial rights did not amount to a denial of substantive due process under the three-part test used by the Second Circuit in *Joyner* and the concept of "objective reasonableness" articulated by the Circuit in *Gottlieb*. *See also Deckon,* 1995 U.S. Dist. LEXIS 13544, 1995 WL 555684, at *5. Accordingly, defendants are entitled to summary judgment dismissing plaintiffs' substantive due process claims.

b. Procedural Due Process

The liberty interests of parent and child in continued care and companionship has both procedural as well as substantive elements. *Van Emrik,* 911 F.2d at 865; Gottlieb, 84 F.3d at 518-22; *Schwimmer v. Kaladjian,* 988 F. Supp. 631, 1997 WL 757767, at *5 (S.D.N.Y. 1997). Accordingly, the Second Circuit, as reflected by *Van Emrik* and *Gottlieb*, has typically [**24] undertaken discrete procedural and substantive due process analyses.

The focus of the procedural due process inquiry in this case is whether Kia was entitled to a hearing regarding the Hospital's decision to hold Mora pending the results of the anticipated confirmatory toxicology screen. As to whether a *pre-deprivation* hearing was required, the Court notes that while "[a] parent may not lawfully be deprived of the custody of his or her child without a hearing 'at a meaningful time and

in a meaningful manner,'" *Gottlieb, 84 F.3d at 520* (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 [*291] (1965)), it is well established that "government officials may remove a child from his or her parents' custody before a hearing is held where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent." *Id.; see also Spencer v. Lavoie,* 986 F. Supp. 717, 1997 WL 754998, at *5 (N.D.N.Y. 1997) ("Appropriate government officials may effect a temporary deprivation of custody, without parental consent or a court order, when presented with 'emergency' circumstances"); *Dietz,* 932 F. Supp. at 444 ("The law of this Circuit, [**25] as well as of other federal courts, is clear that, constitutionally, no prior hearing is required to remove a child from parental custody in an emergency situation."). "There is a sufficient emergency to warrant official's taking custody without a prior hearing if a child is immediately threatened with harm or is bereft of adequate care or supervision." *Robison v. Via,* 821 F.2d 913, 922 (2d Cir. 1987).

The Court concludes that the results of the positive toxicology screen gave defendants an adequate emergency basis for detaining Mora since the initial results provided an objective basis for the Hospital's concern that Mora had been exposed to drugs *in utero*. Accordingly, the Court determines that no pre-deprivation hearing was required. Having reached this conclusion, the question that remains is whether plaintiffs' procedural due process rights were violated by the Hospital's failure to conduct a hearing after it determined to detain the child. Although plaintiffs argue in this regard that defendants should have complied with New York State requirements regarding the removal of children on an emergency basis, n3 the Second Circuit has held that a violation of state law, even [**26] if proved, does not give rise to a § 1983 claim since it is wholly separate from the issue of whether the defendants violated plaintiffs' procedural due process rights under the

United States Constitution. *See Doe v. Connecticut Dep't of Child and Youth Servs.*, 911 F.2d 868, 869 (2d Cir. 1990); Robison, 821 F.2d at 922; *Dietz*, 932 F. Supp. at 453.

> n3 Specifically, plaintiffs cite the New York Family Court Act § 1026(c), which relates to emergency removal of a child from his or her home, and provides that when the City removes a child on an emergency basis, it is required to commence court proceedings "forthwith." Plaintiffs also cite to New York Social Services Law § 417, entitled "Taking a child into protective custody." Section 417(2) provides, in pertinent part, that "the person in charge of any hospital ... shall, where he has reasonable cause to believe that the circumstances or conditions of the child are such that continuing in his place of residence or in the care and custody of the parent, guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health, take all necessary measures to protect the child including, where appropriate, retaining custody of an abused or maltreated child, until the next regular week day session of the family court in which a child protection proceeding pursuant to article ten of the family court act may be commenced ...."

[**27]

The Court therefore turns to federal authority mapping out the contours of procedural due process. The Supreme Court has long held that three separate factors enter into a determination as to the procedural protections the Constitution requires in a given case: first, "the private interest ... affected by the official action"; second, "the risk of an erroneous deprivation of such interest ... and the probable value, if any, of additional or substitute procedural safeguards"; and third, the government's interest. *See Zinermon v. Burch*, 494 U.S. 113, 127, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990) (quoting *Mathews v. Eldridge*,

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424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)). Under the circumstances present here, in light of the imminence of the test results and the probability of confirmation, there was a minimal risk that plaintiffs would be erroneously deprived of their liberty interests and there was no pragmatic reason to implement any particular procedural safeguard. Furthermore, while defendants awaited the expected confirmatory test results, their interest in protecting Mora from the risk of child abuse perdured.

On balance, the Court concludes, as a matter [**28] of law, that plaintiffs' post-deprivation procedural due process rights were not infringed, primarily because it was rational to hold Mora on a day-by-day basis pending the receipt of the anticipated confirmatory test results. As it turned out, no hearing was ever held because Mora was released to Kia's [*292] custody once the test results were received by the Hospital. The Court notes that there is a fair amount of precedent for rejecting procedural due process claims based upon comparable periods of delay under related circumstances. *See Cecere v. New York,* 967 F.2d 826 (2d Cir. 1992) (four-day delay); *Van Emrik, supra* (eight-day delay); *Lossman v. Pekarske,* 707 F.2d 288, 291 (7th Cir. 1983) (12-day delay); *Dietz, supra* (12-day delay). Accordingly, defendants are entitled to summary judgment dismissing plaintiffs' procedural due process claim.

2. Fourth Amendment

The Fourth Amendment prohibition against unreasonable searches and seizures is the quintessential safeguard of one's liberty. *See, e.g., Albright,* 510 U.S. at 274; *Murphy v. Lynn,* 118 F.3d 938, 944 (2d Cir. 1997). Notably, in a case also involving the investigation of child abuse, the Court of Appeals [**29] for the Seventh Circuit observed that whether plaintiffs' constitutional claim is pleaded as a violation of the Fourth

Amendment or as a due process violation under the Fourteenth Amendment, "the same basic analysis is utilized" -- the Court "must essentially weigh the privacy interest of the family member against the interests of the government." *Darryl H. v. Coler,* 801 F.2d 893, 901 n.7 (7th Cir. 1986).

Preliminarily, it is clear that Kia does not have standing to assert a derivative or vicarious Fourth Amendment claim based upon defendants' search or seizure of Mora, but she does have standing to assert a Fourth Amendment claim on Mora's behalf. *See Tenenbaum,* 862 F. Supp. 962, 973-74. As to Mora, plaintiffs apparently raise two claims: first, that administering the urine test was an illegal search; and second, that Mora's detention in the Hospital was an illegal seizure. The Court will consider each of these arguments in turn.

In respect to the Hospital's decision to administer the urine test, although the Fourth Amendment is triggered when state authorities have children undergo medical procedures for investigative purposes, *see Van Emrik,* 911 F.2d 863 at 867, the record [**30] here indicates that the urine test was not ordered by CWA and was given for medical and not investigative purposes. *See Chayo v. Kaladjian,* 844 F. Supp. 163, 169-70 (S.D.N.Y. 1994). Consequently, the Court concludes that the administration of the urine test did not constitute a "search" of Mora in violation of the Fourth Amendment.

The Court now turns to the question of whether the "hold" placed on Mora's release constituted a Fourth Amendment "seizure." The Second Circuit has indicated that an individual is seized if, under the circumstances presented, "'a reasonable person would have believed that he was not free to leave.'" *Gardiner v. Incorporated Village of Endicott,* 50 F.3d 151, 155 (2d Cir. 1995). Kia was not free to take Mora home on March 29, 1993, when Kia was cleared for discharge. Moreover, the Court has already determined that when the Hospital acted to detain Mora, the detention, because it was "entwined" with governmental policies, took on the character of state action.

Accordingly, the Court concludes that Mora was seized within the meaning of the Fourth Amendment.

In determining the reasonableness of a seizure, "the Fourth Amendment requires a careful balancing [**31] of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake.'" *Graham v. Connor,* 490 U.S. 386, 396, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) (quoting *Tennessee v. Garner,* 471 U.S. 1, 8, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985)). Similar to the standard governing the substantive and procedural due process analysis articulated by the Second Circuit in *Gottlieb*, this inquiry requires the Court to determine whether the defendants' actions were "objectively reasonable" in light of the facts and circumstances confronting them. *Graham,* 490 U.S. at 397. Whether a seizure is unreasonable is a determination that can be made as a matter of law. *See, e.g., Drake v. Delta Airlines, Inc.,* 923 F. Supp. 387, 397 (E.D.N.Y. 1996); *see also Alber v. Illinois Dep't of Mental Health and Developmental Disabilities,* 816 F. Supp. 1298, 1305 (N.D. Ill. 1993) (holding that in the absence of "specific [*293] evidence tending to show that the allegations of child abuse were fabricated and that the defendants knew that such allegations were untrue ... the plain bona fides of the official action make the [**32] assumed seizures reasonable as a matter of law for purposes of Fourth Amendment ... analysis") (citing *Snell v. Tunnell,* 920 F.2d 673, 698 (10th Cir. 1990)).

As the Court has already discussed in respect to plaintiffs' due process claims, the governmental interest in protecting children from the effects of child abuse, including prenatal exposure to drugs, is an exceedingly strong one, *see, e.g., Deckon,* 1995 U.S. Dist. LEXIS 13544, 1995 WL 555684, at *5, and balanced against that interest, any intrusion upon Mora's interests was minimal. Under the particularized facts of this case, the defendants' actions were objectively reasonable. Accordingly, Mora's Fourth Amendment seizure rights were

not violated. Therefore, defendants are entitled to summary judgment dismissing all of plaintiffs' Fourth Amendment claims, which consequently disposes of the first and fourth claims of the complaint in their entirety.

3. Right to an Adequate Child Abuse Investigation

In their second claim, plaintiffs contend that their right to an adequate child abuse investigation was violated by the defendants' actions. As the district court noted in *Tenenbaum*, the Constitution does not grant plaintiffs such an independent [**33] right; rather, allegations of inadequate investigation invoke plaintiffs' right to be free of unreasonable searches and seizures in violation of the Fourth Amendment. *Tenenbaum*, 862 F. Supp. 962, 978. Accordingly, the Court concludes that its analysis of plaintiffs' Fourth Amendment claims similarly disposes of this claim. Defendants are consequently entitled to summary judgment dismissing the second claim of plaintiffs' complaint.

4. HIV Discrimination

In their seventh claim, plaintiffs allege that Mora was removed from Kia's care because of her positive HIV status in violation of the Equal Protection Clause of the Fourteenth Amendment. In her affidavit in opposition to defendants' motions, Kia claims that Hospital employees treated her contemptuously because she was HIV positive, expressed an unwillingness to give her anesthesia, left her alone for extended periods of time, and did not tend to her medical needs following Mora's delivery. However, there are no factual allegations whatsoever offered in support of plaintiffs' claim that Mora's detention in the Hospital had anything to do with Kia's HIV status. Nor is there any factual support offered to substantiate plaintiffs' [**34] allegations that the City

defendants discriminated against Kia based upon her HIV status. Conclusory allegations of discrimination are insufficient to defeat a motion for summary judgment. *See Finnegan v. Board of Educ. of the Enlarged City Sch. Dist. of Troy,* 30 F.3d 273, 274 (2d Cir. 1994); *see also Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir. 1985). Accordingly, defendants' motions for summary judgment dismissing the seventh claim are granted.

n4 Although not explicitly addressed by the parties, any perceived § 1983 claim against the Hospital based upon the medical care it rendered Kia would be subject to dismissal since, as the Court has already noted, a hospital providing medical services is not, without more, a state actor under § 1983. *See Deckon,* 1995 U.S. Dist. LEXIS 13544, 1995 WL 555684, at *4.

In conclusion, the Court determines that none of the plaintiffs' constitutional rights were violated by the defendants' actions. Moreover, contrary to plaintiffs' arguments in opposition to defendants' summary judgment motions, [**35] there are no material issues of fact that would preclude the Court from awarding judgment as a matter of law dismissing all of plaintiffs' federal claims. The factual issues identified by plaintiffs--whether Kia was an unfit mother, whether she was administered a drug during labor that could have affected the results of the urine screen, whether Mora was held for medical or "social" reasons, or both, and others--do not affect the availability of summary judgment because even if resolved in plaintiffs' favor for purposes of these motions, they do not give rise to questions of fact that require a trial of plaintiffs' constitutional claims.

C. Are the individual City Defendants otherwise immune from suit?

In addition to concluding that plaintiffs' constitutional rights were not violated, the [*294] Court also determines, in any event, that the § 1983 claims must be dismissed against each of the individual City defendants in their individual capacities.

1. Personal Involvement

City Defendants Sabol and Little are sued individually as well as in their official capacities. Plaintiffs allege that Sabol and Little, in their roles as policymakers for the City Department of Social [**36] Services and CWA, respectively, created the City policies under which the constitutional violations allegedly at issue in this case occurred. Insofar as plaintiffs sue these defendants individually, it is well-settled that a defendant's personal involvement in an alleged constitutional violation is a prerequisite to the imposition of damages under § 1983. *See Al-Jundi v. Rockefeller,* 885 F.2d 1060, 1066 (2d Cir. 1989); *Chayo,* 844 F. Supp. at 172. The fact that these defendants may have been in high positions of authority is not sufficient to subject them to personal liability under § 1983. *See Al-Jundi,* 885 F.2d at 1065. Apart from the allegations of the Complaint, there is absolutely no evidence in the record that these two defendants were personally involved in the actions giving rise to this case. Accordingly, plaintiffs' § 1983 claims, to the extent that they are asserted against these defendants in their individual capacities, should be dismissed on this alternative basis.

2. Qualified Immunity

The Court also concludes that the actions of Delamothe and McIntyre, the individual City defendants who are alleged to have participated directly in the detention of [**37] Mora, fall within the scope of the qualified immunity doctrine. n5

Qualified immunity "generally shields governmental officials from liability for damages on account of their performance of discretionary official functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *McEvoy v. Spencer,* 124 F.3d 92, 97 (2d Cir. 1997) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)); *see also Ricciuti v. New York City Transit Auth.,* 124 F.3d 123, 127 (2d Cir. 1997). Qualified immunity protects government officials from the burdens of defending lawsuits that are ultimately determined to be insubstantial, and also guards against the risk that "fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton,* 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *see also Lennon v. Miller,* 66 F.3d 416, 420 (2d Cir. 1995).

n5 Qualified immunity is an affirmative defense to a § 1983 action that must be pleaded by the defendants. *See Gomez,* 446 U.S. at 640; *McCardle v. Haddad,* 131 F.3d 43, 50 (2d Cir. 1997). Although the individual city defendants pleaded this affirmative defense in their Answer, Morance, the only individual Hospital defendant, did not. The Second Circuit has held that a failure to raise qualified immunity as an affirmative defense "'results in 'the waiver of that defense and its exclusion from the case.'" *Satchell v. Dilworth,* 745 F.2d 781, 784 (2d Cir. 1984) (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1278, at 339 (1969)); *see also McCardle,* 131 F.3d at 51 ("The qualified immunity defense can be waived, either by failure to raise it in a timely fashion, or by failure to raise it with sufficient particularity" (citations omitted)); *Blissett v. Coughlin,* 66 F.3d 531, 538 (2d Cir. 1995) ("Because qualified immunity is an affirmative defense, it is incumbent upon the defendant to plead, and

adequately develop, a qualified immunity defense during pretrial proceedings so that the trial court can determine which claims, if any, may be disposed of by summary judgment, or, at least, which facts material to the qualified immunity defense must be presented to the jury to determine its applicability once the case has gone to trial."). Therefore, the Court limits its discussion to whether the individual City defendants are entitled to qualified immunity.

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"Objective reasonableness" is the linchpin of the qualified immunity analysis embraced by the Supreme Court and the Second Circuit. Indeed, the Second Circuit has specifically noted that in qualified immunity cases, "we are not concerned about the correctness of the defendants' conduct, but rather the 'objective reasonableness' of their chosen course of action given the circumstances confronting them at the scene." *Lennon,* 66 F.3d at 421; *see also Ricciuiti,* 124 F.3d at 127-28; *Estate of Rosenbaum v. City of New York,* 975 F. Supp. 206, 215 (E.D.N.Y. 1997). Even if the scope of the [*295] plaintiffs' rights and the defendant's conduct were established at the time of the alleged violation, a government officer will nonetheless be protected from liability if "'officers of reasonable competence could disagree' on the legality of the defendant's actions." *Lennon,* 66 F.3d at 420 (quoting *Malley v. Briggs,* 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986)).

The law is clear that the question of whether a reasonable officer should have known that he or she acted unlawfully is a question for the Court and not for the jury, and is properly resolved on a motion for summary [**39] judgment. *See Hunter v. Bryant,* 502 U.S. 224, 227-28, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991); *Tierney v. Davidson,* 133 F.3d 189, 194 (2d Cir. 1998); *Lee v. Sandberg,* 136 F.3d 94, 101-02 (2d Cir.

1997); *Davidson v. Scully,* 114 F.3d 12, 14 (2d Cir. 1997); *Lennon,* 66 F.3d at 421-22. Summary judgment is therefore appropriate if:

> the asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiffs and with all permissible inferences drawn in their favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.

Davidson, 114 F.3d at 14 (quoting *In re State Police Litigation,* 88 F.3d 111, 123 (2d Cir. 1996)).

In this case, McIntyre, as supervised by defendant Delamothe, is alleged to have participated in Mora's detention. Specifically, it is alleged that even after Mora was medically cleared for discharge, she was held at the behest of McIntyre until the CWA could determine whether it would be taking any action against Kia. Again, [**40] plaintiffs point out that CWA apparently had a policy that children who were the subject of ongoing child abuse investigations were not to be released from hospitals without CWA permission.

As noted above, both Kia and Mora had clearly established constitutionally protected liberty interests under both the Fourteenth and Fourth Amendments. However, as is clear from the foregoing discussion of plaintiffs' constitutional claims, the Court concludes that defendants Delamothe and McIntyre, the only City defendants alleged to have participated directly in the CWA's handling of Mora's case, acted objectively reasonably, and that they are consequently immune from personal liability under § 1983. Their actions were based upon the objective findings of a laboratory test, which, once disputed, were immediately sent to an outside laboratory for anticipated

confirmation. McIntyre made a prompt visit to Kia's house and interviewed Kia and her husband. Upon completion of the interview, she contacted Morance to inform her that Kia had vehemently denied taking drugs during her pregnancy. Once the unexpected non-confirmatory results were received, McIntyre and Delamothe promptly decided that CWA [**41] was not going to pursue an investigation of the child abuse charges against Kia, and so notified the Hospital. As the Second Circuit noted in *Defore v. Premore,* 86 F.3d 48, 51 (2d Cir. 1996):

> We can well understand the distress of the parents that their child was in the custody of public officials on the basis of ... allegations that were ultimately determined to be unfounded. But the proper means to challenge such assertions of public authority are by recourse to state courts to test continued public custody, not to seek to hold publicly employed caseworkers liable for damages.

Thus, in light of the compelling nature of the government's interest in the prevention of child abuse, the Court determines that the actions of Delamothe and McIntyre were both reasonable and appropriate, and that "no rational jury could fail to conclude that it was objectively reasonable for [them] to believe that they were acting in a fashion that did not violate a clearly established right." *Davidson,* 114 F.3d at 14; *see also Tierney,* 133 F.3d at 196.

CONCLUSION

For the foregoing reasons, the Court grants defendants' motions for summary judgment in respect to all of plaintiffs' [**42] expressed [*296] federal claims, namely, their first, second and seventh claims. To the extent that plaintiffs' fourth

claim also raises constitutional arguments, it is also dismissed. Since the sole source of federal jurisdiction over this case is the § 1983 claims, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims. 28 U.S.C. § 1367(c)(3) (district courts may decline supplemental jurisdiction where "the district court has dismissed all claims over which it has original jurisdiction"); *see Choe v. Fordham Univ. Sch. of Law*, 81 F.3d 319 (2d Cir. 1996).

Accordingly, the Court dismisses plaintiffs' complaint in its entirety.

SO ORDERED.

Dated: Brooklyn, New York
April 15, 1998
FREDERIC BLOCK
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KIA P., individually and on behalf of MORA P., an infant,

Plaintiffs,

-against-

ROSEMARY McINTYRE, et al.,

Defendants.

CV-94-0664
(Block, J.)
(Pollack, MJ.)

STATEMENT PURSUANT TO RULE 56.1(b)

The following facts alleged by municipal defendants in their statement pursuant to Rule 56.1 are disputed by plaintiffs:

1. Plaintiffs dispute the allegations in ¶2, in that plaintiff did not relate a history of syphilis or tuberculosis;
2. Plaintiffs dispute the allegation in ¶3 that it is generally accepted medical procedure to perform urine toxicologies on newborns;
3. Plaintiffs disputes the allegation in ¶10 that Mora P. had signs and symptoms consistent with methadone withdrawal and further disputes the allegation that treating physicians noticed any signs or symptoms;
4. Plaintiffs dispute the allegation in ¶13 that the hospital sent Mora P's urine specimen to an outside laboratory pursuant to routine hospital practice;

5. Plaintiffs dispute the allegation in ¶15 that SmithKline acted at the request of the hospital;
6. Plaintiffs dispute the allegation in ¶16 that Long Island College Hospital placed Mora P. under medical observation.
7. Plaintiffs dispute the allegation in ¶18 that the confirmatory test "could not confirm" the presence of methadone, and assert that the confirmatory test showed that Kia P. had not used methadone.
8. Plaintiffs dispute the allegation in ¶19 that National Medical Services did not test Mora's urine for methadone metabolite.
9. Plaintiffs dispute the allegation in ¶20 that plaintiff Kia P. never demanded that the treating physicians release Mora P. from the hospital.
10. Plaintiffs dispute the allegation in ¶21 that CWA never placed a hold on Mora.
11. Plaintiffs dispute the allegation in ¶21 that CWA caseworkers were waiting for the hospital to notify them that Mora was "medically cleared."
12. Plaintiff disputes the allegation in ¶22 that CWA caseworkers were waiting to the hospital to act.
13. Plaintiff disputes the allegation in ¶23 that the treating physicians medically cleared Mora on April 7, 1993.
14. Plaintiff disputes the allegation in ¶24 that treating physicians notified Susan Morance on April 7, 1993, that Mora P. was medically cleared for discharge.

Plaintiffs allege that the following facts are in dispute:

15. Whether Long Island College Hospital or the Child Welfare Administration made the decision to detain infant plaintiff

Mora P. for eleven days.

16. Whether plaintiff Kia P. consented to the detention of her daughter Mora P.
17. Whether the Child Welfare Administration had a policy of routinely detaining children in hospitals without due process of law.
18. Whether Kia P. took methadone during her pregnancy with Mora P.
19. Whether Kia P. was an unfit mother.
20. Whether the drug test on Mora P's urine conducted by National Medical Services was negative or inconclusive.
21. Whether the EMIT test is unreliable because of the high incidence of false positive results.
22. Whether the urine of a newborn whose mother was given phenergan during labor will test positive for methadone on the EMIT test.

Plaintiffs adopt for purposes of this motion the facts set forth in hospital defendants' statement pursuant to Rule 56.1

Dated: June 13, 1997, New York, New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KIA P., individually and on behalf of MORA P., an infant

Plaintiffs,

CV-94-0664
(Block, J.)
(Pollak, MJ.)

-against-

ROSEMARY McINTYRE, individually as caseworker, Child Welfare Administration, DOREN DELAMOTHE, individually and as supervisor, Child Welfare Administration, BARBARA SABOL, individually and as Commissioner of Social Services of the City of New York, ROBERT LITTLE, individually and as Deputy Commissioner of Social Services of the City of NEW YORK, CITY OF NEW YORK, LONG ISLAND COLLEGE HOSPITAL, and SUSAN MORANCE,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

KIA P., being duly sworn, deposes and says as follows:

1. I am the plaintiff in the above-captioned proceeding and make this affidavit in opposition to defendants' motion for summary judgement.
2. At approximately 10:30 p.m. on March 26, 1993, I went into labor at my home in Brooklyn. I was unable to travel to North Central Bronx Hospital, where I had been receiving prenatal care, because of the hour, and I was admitted to Long Island College Hospital ("LICH") on March 27, 1993.
3. My daughter Mora P. was born on March 27, 1993, at LICH.
4. I had telephoned LICH in the eighth month of my pregnancy to reserve a bed. When I told the woman on the phone at LICH that I was HIV positive, she told me that I'd better have prenatal care and take a drug test, or else I would go to jail.
5. Upon arrival at LICH on March 27, 1993, I informed LICH staff that I am HIV positive. The staff members began interrogating me as to why I came to their hospital, and commenting on my HIV status.
6. When I arrived at the hospital, I was carrying a blue card with the results of bloodwork from every prenatal visit at the North Central Bronx Hospital. The blue card showed that I had received prenatal care. I gave this card to the nurses in the maternity ward at Long Island College Hospital.
7. I was put in a corner room on the maternity ward at LICH, and waited there alone and in pain. A nurse came into the room wearing white towels wrapped around her neck, arms, and chest, and two pairs of gloves. I asked the nurse why she was dressed that way, and she said that it was for her protection.

8. I was moved to another room in the maternity ward, which was down a hallway and dimly lit. I was left alone in that room until the morning.
9. I was in severe pain, and I kept asking for an epidural. The nurses would not give me one, saying that they couldn't give me epidural because I was HIV positive.
10. Immediately after my child Mora P. was born, she was taken from the room, and I was not allowed to hold her.
11. Immediately after Mora P. was born, I was left alone in a room in the maternity ward for approximately an hour. I was not cleaned up after the birth. I was not stitched up after the birth, even though the birth was difficult and caused tearing.
12. After my child Mora P. was born, I was in the bathroom and the afterbirth fell out of me into the toilet. I was scared, and rang the emergency bell in the bathroom to get help from the nurses. The nurse told me to pick the afterbirth out of the toilet myself and bring it to the nurse's station.
13. The nurses would not let me feed my child until I had taken a test for tuberculosis. I gave birth in the morning, but the tuberculosis test was not taken until after 10 p.m. that evening. When the test results came back negative, I was first allowed to hold my baby, but she was taken from me the next day.
14. On March 28, the Social Worker Susan Morance announced in front of the nurses' station, so that everyone around could hear her, that my baby had tested positive for methadone.
15. I was not asked by anyone if my child's urine could be tested, and did not consent to such test.
16. I was discharged from the hospital on March 29, 1993.

My child was not released until April 8, 1993. After I was discharged, I was only permitted to see my daughter at feeding times, which were every four hours. I waited in the lounge on numerous occasions, trying to see my daughter, until the LICH staff told me I had to leave.

17. I never consented to having my daughter held in the hospital.
18. I repeatedly demanded Mora be given to me, and hospital staff, including Susan Morance, repeatedly told me that I could not take Mora from the hospital.
19. On March 29, 1993, when I was discharged and I was not allowed to take Mora, I called my midwife from North Central Bronx, Marjorie Nicholson, and asked her to make calls to help me get Mora released.
20. I also called my close friend Tamar Sokol and asked her to help me get Mora released.
21. Tamar and I both called attorney Cynthia Schneider at Brooklyn Legal Services to ask her to help me get Mora released.
22. I made all of these telephone calls from the pay telephone in the lounge at Long Island College Hospital, because I did not want to leave the hospital and go home without my child.
23. I told Ms. Morance I refused to leave the baby in the hospital, and she told me that she would call security personnel to throw me out if I did not leave.
24. I wanted to get Mora out of LICH immediately.
25. I was scared, based upon the way hospital staff treated me for being HIV positive and based upon the way the hospital was handling the drug testing, that hospital staff might mistreat Mora. I thought that a hospital that did not have staff who understood these things might give her

medications without my consent, stick needles in her to take blood and do unnecessary tests, not change her diapers or care for her properly, or maybe throw her in a corner somewhere like they did to me.

WHEREFORE deponent respectfully requests that defendants' motion for summary judgment be denied.

_____

KIA P.

Sworn to before me this
13th day of June 1997

_____

Notary Public

The Long Island College Hospital
Administrative Procedures and Information Manual

MANUAL CODE: SO-100

SUBJECT: Abused or Maltreated Children

EFFECTIVE: 7/1/81 SUPERSEDES: 2/1/79

GENERAL STATEMENT OF PURPOSE:

The Child Protective Services law makes it mandatory to report all cases of suspected child abuse and/or maltreatment and affords immunity to any person or institution from any liability - civil or criminal - arising from the making of such a report.

PROCEDURE

A. "Abused" or "maltreated" children include all children under 18 years of age.

B. Attending physicians, house officers, nurses, social workers, or anyone engaged in the admission, examination or treatment of an abused or maltreated child should report to the Chief resident in Pediatrics, or his designee, any case where there is reason to believe that an injury is the result of abuse.

C. Color photographs must be taken at the time of initial examination, or as soon thereafter is possible. Photographs are ordered by the physician and are taken by the Security department. Photographic equipment will be kept in the Security office and they will be responsible for maintaining all necessary supplies.

D. Examples of typical findings useful in diagnosing abuse or maltreatment are: malnutrition, obvious neglect, subdural

hematomas, x-ray of bones showing perio-steal reaction, fractures or bruises, psychotic behavior, retarded growth or development, trauma or burns of suspicious origin, repeated emergency room visits.

E. The Chief resident in Pediatrics will inform the Director of Pediatrics and the Social Work Department and will them immediately call the Bureau of Child Welfare to report the case. The Central Registry for all of New York City is open seven days a week, 24-hours a day. The number to call is 212-431-4680.

F. Within 48 hours, the Chief resident in Pediatrics is responsible for completing Form DSS-2221, "Report of Suspected Child Abuse or Maltreatment," copy of which is attached. This form is available in the Emergency Room and in Nursing Administration. The distribution is as follows: Original and one copy to B.C.W., Emergency Children's Services, 241 Church Street, New York, 10013, along with the photographs; one copy to Medical Records; one copy to the Director of Social Work Services; one copy to the Director of Pediatrics.

G. The family is referred to the Social Work Department, which will immediately contact B.C.W. to determine whether the family is known to them and if a previous history of abuse exists.

H. Social Work and the Chief resident in Pediatrics will determine if it is in the child's best interest to be returned to the parent or guardian. If not, and irrespective of whether additional medical treatment is required, arrangements will be made for the immediate admission of the child to the hospital. If it is felt that the parent or guardian may refuse permission or become violent, the Chief resident should call the Administrator-on-Duty BEFORE suggesting admission. When the A.O.D receives such a call, he or she will call the local precinct BEFORE the parent or guardian is notified of the decision to admit. The A.O.D. will also notify the Risk Management office.

I. It is the responsibility of the social worker to help ascertain whether this is willful abuse; the social worker will work with the family toward change or placement; the social worker will work with the agency designated to receive reports and will assist with discharge plans for the child.

J. The child, if admitted to the hospital, may not be released to the parent or guardian except by order of the Family Court or the protective unit which will assume responsibility, upon discharge, for the child and the family.

AFFECTED DEPARTMENTS:

President /s/

Vice President /s/

Vice President-Director of Nursing /s/

Director of Pediatrics /s/

Director of Ambulatory Care Services /s/

Director of Social Work Services /s/

Director of Security /s/

H1

Relevant Constitutional Provisions, New York Statutes, and Administrative Rules

UNITED STATES CONST., AMEND. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

UNITED STATES CONST., AMEND. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 (THE CIVIL RIGHTS ACT OF 1871):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Soc. Servs. Law § 413:

The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child ...: any physician; registered physician assistant; surgeon; medical examiner; ... resident; intern; psychologist; registered nurse; hospital personnel engaged in the admission, examination, care or treatment of persons; ... social services worker;... or mental health professional ....

New York Social Servs. Law § 417(2):

§ 417. Taking a child into protective custody

* * * *

2. Notwithstanding any other provision of law, the person in charge of any hospital or similar institution shall, where he has reasonable cause to believe that the circumstances or conditions of the child are such that continuing in his place of residence or in the care and custody of the parent,

guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health, take all necessary measures to protect the child including, where appropriate, retaining custody of an abused or maltreated child, until the next regular week day session of the family court in which a child protection proceeding pursuant to article ten of the family court act may be commenced whether or not additional medical treatment is required during that period and whether or not a request is made by a parent or guardian for the return of the child during that period. In all cases where the person in charge of a hospital or similar institution has retained custody of a child pursuant to this section, he shall immediately notify the appropriate local child protective service which immediately shall commence an investigation. In the case of a child in residential care, the child protective service shall notify the appropriate state agency which shall immediately commence an investigation. If no further medical treatment is necessary, the child protective service shall take all necessary measures to protect a child's life and health, including when appropriate, taking custody of a child. Such child protective service shall commence a child protective proceeding in the family court at the next regular week day session of the appropriate family court or recommend to the court at that time that the child be returned to his parents or guardian.

New York Comp. Codes R. & Regs., Title. 18, § 432(o):

Upon notification that a child is retained in protective custody, the child protective service shall commence a proceeding at the next regular weekday session of the

> appropriate Family Court, or recommend to the court at that time that the child be returned to his parents or guardian.

Memorandum of June 3, 1991, from Robert L. Little, Executive Deputy Commissioner of Child Welfare Administration, and Barry Ensminger, General Counsel, Office of Legal Affairs, to all CWA and Office of Legal Affairs staff, at 2:

> Holds of children in the hospital directed by CWA staff are the equivalent of emergency removals. No such removals may continue more than 24 hours (or until the next regular court day) without court authorization.

Child Welfare Administration, Child Protective Services Field Operations Manual, Issued December 15, 1991, ch. 6, at 3:

> The caseworker must go to Family Court within 24 hours or the next working day to file a petition [for protective custody].

Supreme Court, U.S.
FILED
JUL 3 2001
CLERK

No. 00-1800

IN THE

Supreme Court of the United States

KIA P., individually and on behalf of MORA P., an infant, and MORA P.,

Petitioners,

v.

ROSEMARY McINTYRE, individually and as the Caseworker, Child Welfare Administration, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LONG ISLAND COLLEGE HOSPITAL AND SUSAN MORANCE

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6, Long Island College Hospital states that it is a Voluntary Corporation that is operated pursuant to Article 28 of the New York State Public Health Law, does not have any shares of stock which are publicly traded, and that no publicly held company owns ten (10) percent or more of Long Island College Hospital's stock.

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REASONS FOR DENYING THE WRIT

1. A 42 U.S.C. § 1983 claim does not lie against a private hospital or a private social worker when a hospital, through its medical staff, provides medical treatment, on a good faith basis, to an infant suspected of methadone withdrawal.

2. The United States District Court for the Eastern District of New York and the Second Circuit Court of Appeals properly decided that Petitioners' civil rights had not been violated and properly dismissed Petitioners' claims.

3. This Court's recent decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) does not affect the Second Circuit's decision in this case as to when a private hospital will be determined to be a state actor.

OPINIONS BELOW

Both the United States District Court for the Eastern District of New York, which granted summary judgment to all defendants, and the United States Court of Appeals for the Second Circuit, which affirmed that decision, have found that the Respondents have no liability in this 42 U.S.C. § 1983 action.

STATEMENT OF THE CASE

Petitioners' Statement of the Case and Statement of Facts contain numerous misstatements and *omissions* of fact. Accordingly, Respondents offer the following as a complete and accurate account of the facts in this case.

STATEMENT OF THE FACTS

The synthesized facts of the underlying case are simple. Petitioner, Kia P., presented to Long Island College Hospital ("the Hospital") in labor with a full-term pregnancy. She had not received any pre-natal care at the Hospital and gave a history of being a prior crack-cocaine drug abuser and of having been diagnosed with syphilis, tuberculosis and HIV. According to the Hospital's written protocol regarding "Nursing Management of Infants at Risk for or Having Symptoms of Neonatal Drug Withdrawal", Petitioner met three of the criteria that necessitated a toxicology screen of the infant's urine to insure the infant's well-being. After delivery, the infant's urine was collected and sent to the Hospital's laboratory for an EMIT assay screening for illicit substances. The EMIT assay screening of the infant's urine was positive for methadone. Kia P. was questioned about her drug use during this pregnancy. She denied using methadone during the pregnancy. A Hospital social worker, Respondent, Susan Morance ("Ms. Morance"), informed Kia P. that she and the Hospital were required to report the case to the New York State Central Registry for Child Abuse.[1] Ms. Morance reported the case to the Central

---

1. Ms. Morance's authority as a social worker derives from New York Social Services Law. Title VI, entitled "Child Protective Services," was enacted in 1973 to provide more effective protection to abused and maltreated children in New York State. One of its purposes was to

> encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children

(Cont'd)

Registry promptly and the physicians at the Hospital treated and observed the infant for signs and symptoms of methadone

(Cont'd)

> from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.

N.Y. Soc. Serv. Law § 411.

The statute encourages, even requires, a wide variety of persons to report suspected child abuse. Section 413 permits some of the written reports from persons or officials to be admitted in evidence and authorizes various officials, including "a designated employee of a city or county department of social services," to take a child into protective custody without consent of the parent whenever continuing the child in the parents' custody presents an "imminent danger" to the child's health. N.Y. Soc. Serv. Law § 417(1).

The New York Child Protective Services Act provides a comprehensive statutory system and procedural framework for the reporting of suspected cases of child abuse. Section 413 of the Child Protective Services Act requires certain individuals, including physicians, nurses and any hospital personnel engaged in the admission, examination, care or treatment of persons, to report or cause a report to be made when they have "reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Section 413 further provides:

> Whenever such person is required under this Title in his capacity as a member of the staff of a medical . . . institution . . . he shall immediately notify the person in charge of such institution, . . . who then also shall become responsible to report or cause reports to be made.

Thomas v. Beth Israel Hosp., 710 F. Supp. 935, 940 (S.D.N.Y. 1989).

Section 420 of the Child Protective Services Act makes the failure to report a case of suspected child abuse a criminal offense, a Class A misdemeanor, punishable in New York State by up to one year in prison, and subjects individuals who willfully fail to make such reports to civil liability for the damages proximately caused by such failure.

withdrawal. Methadone withdrawal is a serious medical condition and is potentially fatal to infants. The infant displayed signs of irritability and tremors, both of which are symptoms of methadone withdrawal. Pet. App. at B4 and D3. The infant was treated with supportive care. Based upon Kia P.'s denial of methadone use during this pregnancy, the infant's urine was forwarded to an outside laboratory for confirmatory testing. The first laboratory could not test the infant's urine because the sample was too small. Therefore, the urine sample was forwarded by the first laboratory to another laboratory for microscopic testing.

The first laboratory's inability to conduct the required testing caused a delay that was not due to any fault of the Hospital. The microscopic testing could not detect a presence of methadone. Once the confirmatory test results were received by the Hospital, on April 7, 1993, Hospital laboratory personnel reported those results to the infant's physicians. Based upon the results and the lack of further withdrawal symptoms, the physicians transferred the infant from a medical observation status to "ALC" (Alternate Level of Care), which indicated that there was no longer any medical need for the infant to remain in the Hospital. On April 7, 1993, Ms. Morance also reported the test results to CWA. Within one day, the Child Welfare Administration, Ms. McIntyre and Ms. Delamothe (the "City Respondents") made a determination that they were not going to take any action against Kia P. and communicated this information to the Hospital through Ms. Morance on April 8, 1993. The infant was released from the Hospital that same day at 11:20 a.m. Based upon these occurrences, Petitioners brought this action against the Hospital, Ms. Morance and the City Respondents.

Petitioners claim that Mora was on a "social hold" from the time of her birth. There has been no evidence to support this claim. At the conclusion of discovery all witnesses had testified that Mora was on a "medical" hold, being medically treated, due to her methadone withdrawal. Petitioners brazenly claim that the EMIT assay was false. This is also not true. The presence of methadone could not be confirmed in the infant's urine seven days after it was initially collected, but the microscopic testing via gas chromotography/mass spectometry (gc/ms) did not test for the presence of methadone metabolites. All the gc/ms testing showed was that, seven days post collection, the presence of methadone could not be confirmed. Petitioners also claim that the EMIT screening test used by the Hospital is "frequently inaccurate." There has been no evidence, other than Petitioner's own expert witness's statement, that the EMIT assay used for the routine screening of the infant's urine for illicit drugs is at all inaccurate. Moreover, Petitioners state that the drug Phenergan cross-reacts as methadone for the EMIT assay. However, they fail to mention that the Phenergan would have to be given in extremely high doses and that such high doses were not administered to Kia P. Petitioners also allege that Kia was limited in her visits with Mora for the purpose of feeding her. The District Court found that "it is uncontested that while Mora remained in the Hospital, Kia was permitted to, and did, visit Mora, including during feeding times." Pet. App. at D4. Petitioners attempt to enlist this Court's sympathy by claiming they were caused to suffer an "indignity" when submitting to drug testing by CWA. However, the District Court and the Second Circuit Court found that Kia and her husband "voluntarily submitted to drug tests". Pet. App. at B5.

Petitioners' statement of the facts egregiously fails to acknowledge that the infant showed signs and symptoms of methadone withdrawal, tremors and irritability. The Second Circuit noted the District Court's finding that "there is undisputed evidence in the record that an infant's methadone withdrawal can take a minimum of one week to manifest itself. Hospital records indicate that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal." Pet. App. at B4. Petitioners omit the fact that the infant was being medically observed during her entire admission for potentially fatal seizures due to methadone withdrawal. Pet. App. at B4.

Petitioners have offered no evidence in admissible form supporting their allegations that the Respondents violated any of Petitioners' constitutionally protected rights. As Petitioners' false accusations are wholly unsupported by the record, their petition for a writ of certiorari should be denied.

RESPONDENTS' ARGUMENT

A. There Is No "Split" Among The Circuits On The Issues Presented In This Case.

Petitioners have misconstrued this Court's holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). In an effort to obtain certiorari review, Petitioners contend that:

> 1. The Second Circuit's decision has created a split in the Circuits on the question of whether there is state action when a private hospital detains a minor for child protective reasons.

Pet. Brief at 15.

Petitioners ignore the multitude of decisions from this Court and all Circuit Courts which hold that there is no bright line for determining who is and who is not a state actor because each case is fact specific. *Evans v. Newton*, 382 U.S. 296 (1966); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Community Med. Center v. Emergency Medical Svcs., Inc.*, 712 F.2d 878 (3d Cir. 1983); *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Frazier v. Board of Trustees*, 765 F.2d 1278 (5th Cir. 1985); *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983). "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State ('in any of its manifestations') has become significantly involved in private discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967). The *Brentwood* court stated:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government. *See Tarkanian*, 488 U.S. at 193, 196; *Polk County v. Dodson*, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981).

Brentwood, supra at __, 121 S. Ct. at 930.

Because a single standard test is not practical or possible, this Court has adopted a number of approaches depending on the circumstances, and has counseled lower courts to carefully investigate the facts of each case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

This Court's decision in *Brentwood* is consistent with its previous holdings in cases regarding state actors. There has been no major revision or addition to the tests based upon the holdings of *Brentwood*. Moreover, the Second Circuit's decision in the instant case is entirely consistent with those holdings. The *Brentwood* case is quite simple and straightforward. There, the Tennessee Secondary School Athletic Association (TSSAA) was incorporated to regulate interscholastic athletic competition among public and private secondary schools in Tennessee. *Id.* at __, 121 S. Ct. at 927. The TSSAA had historically been seen to regulate *in lieu* of the State Board of Education's exercise of its own authority. In fact, the State Board of Education for Tennessee, in 1972, expressly "designated" the TSSAA as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis. *Id.* at __, 121 S. Ct. at 928. Prior to this delegation of duty, supervision and regulation of junior and senior high school athletic activities had been a state function, as part and parcel of providing an education to the children of Tennessee. Once the State Board of Education in Tennessee cloaked the TSSAA with the authority to organize and supervise the athletic component of Tennessee's responsibility to educate its children, TSSAA became a state actor subject to Fourteenth Amendment scrutiny.

In this case, the State did not delegate any responsibilities to the Hospital for the care and treatment of this infant.

The Hospital was a private actor, privately treating this infant and her mother who put themselves in the care of the Hospital's physicians and nurses when Kia P. presented to the Hospital for the delivery of Mora. The State, through CWA or any other source was never involved, even peripherally, in any of the medical treatment decisions made by the Hospital's physicians.

This Court in *Brentwood*, *supra*, and a plethora of related cases, has held that

> "[t]he judicial obligation is not only to preserve an area of individual freedom by limiting the reach of federal law and avoid the imposition of responsibility on a State for conduct it could not control," *Tarkanian*, *supra*, at 191 (quoting *Lugar*, *supra*, at 936-937), but also to assure that constitutional standards are invoked "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum*, *supra*, at 1004.

The test this Court adopted is the test commonly used in one form or another throughout all the Circuit Courts and was the test used by the Second Circuit in the decision that is before this Court for review. This test is the *close nexus* test. Specifically, this Court has stated that "state action may be found if, *though only if*, there is such a 'close nexus between the State and the challenged action' " that seemingly private behavior "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added).

There is abundant authority for the Second Circuit's decision that the Hospital was not a state actor while providing medical care to Mora. *See Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000). In making a determination of whether a

private party is a state actor for Fourteenth Amendment purposes, analyzing *Brentwood* together with all the preceding cases, this Court has taken a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). Those tests used to determine state action include the close nexus, symbiotic relationship, joint action and public function tests. Each of the eleven United States Circuit Courts of Appeal has also applied these tests completely consistent with the recent *Brentwood* decision. Based upon any of these tests Petitioners can not show that the Hospital was a state actor when it medically treated Mora for methadone withdrawal. Further, Petitioners can not show that Ms. Morance was a State actor when she carried out her duties as a hospital employed social worker.

The Close Nexus Test

First, under the *close nexus* test, "a plaintiff must demonstrate that there is a sufficiently close nexus between the government and the challenged conduct such that the conduct may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. *See also Lugar*, 457 U.S. at 936; *Collyer v. Darling*, 98 F.3d 211 (6th Cir. 1996); *Jensen, supra.*

A "state official's mere approval of or acquiescence to the conduct of a private party is insufficient to establish the nexus required for state action." *See Gallagher, supra*, at 1450. The close nexus — state action determination requires an examination of all the relevant circumstances, in an attempt to evaluate the degree of the Government's participation in the private party's activities. *Skinner, supra*. Whether a private party should be deemed an agent or instrument of the Government for Fourteenth Amendment purposes necessarily turns on the

degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. *Evans v. Newton*, 382 U.S. 296 (1966). Only by sifting facts and weighing circumstances can the court determine whether the reach of the Fourteenth Amendment extends to a particular case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). There is no specific formula for determining state action. *Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984) (quoting *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999); *Patrick v. Floyd Med. Center*, 201 F.3d 1313 (11th Cir. 2000).

The Symbiotic Test

The second test is the *symbiotic relationship* test. A symbiotic relationship constitutes state action if the State "has so far insinuated itself into a position of interdependence [with a private party that] it must be recognized as a joint participant in the challenged activity." *Burton*, 365 U.S. at 725 (1961).

The Willful Participant Test

Third, state action can be present if a private party is a "willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). As with the other tests, "the mere acquiescence of a State official in the actions of a private party is not sufficient." *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978). "Constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum, supra*, at 1004 (1982).

This Court in *Blum* also applied the close nexus test. And after finding that the actions of a private nursing home could not be fairly attributed to the State, this Court looked at a second part of the nexus test. This Court specifically noted that the

> "factual setting of each case will be significant", [but the] precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Id. at 1004. To prove a conspiracy between private parties and the state under section 1983, the plaintiff must show a joint participation, agreement, or meeting of the minds to violate constitutional rights. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). And, there must be sufficient evidence of a conspiracy to prevent the jury from engaging in sheer speculation and conjecture. *See Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121 (10th Cir. 2000); *Scott v. Hern*, 216 F.3d 897 (10th Cir. 2000); *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991).

The Public Function Test

Finally, the *public function* test is narrow and difficult to satisfy. A private party is a state actor if the state delegates to it a "function traditionally exclusively reserved to the State." *Jackson, supra*, at 352. *See also Rockwell v. Cape Cod Hosp.*, 26 F.3d 254 (1st Cir. 1994); *Goldstein, supra*; *Payton v. Rush-Presbyterian-St. Luke's Medical Center*,

184 F.3d 623 (7th Cir. 1999). This Court has found only a few areas, including the administration of elections of public officials, to be public functions.

Applying any one of these four tests, especially the entwinement or joint action test, which Petitioners assert is their strongest argument, Petitioners fail to demonstrate sufficient evidence of state action against the Hospital or Ms. Morance.

Therefore, Petitioners are left with the argument that the Hospital, separate and apart from medical judgments can be determined to be a state actor thereby subjecting the Hospital to liability under section 1983. This argument fails as well based upon the lack of proximate cause. Petitioner has asserted this second theory that "concurrent with the medical care rendered to Mora, the Hospital's Administration was acting in another capacity to detain Mora." This fictitious allegation is without record support and without proof of a direct and proximate cause, Petitioners' allegations must fall. Petitioners claim that the infant was held by the Hospital for two concurrent reasons. The first, for which liability under § 1983 cannot attach, was that in the judgment of the Hospital doctors, medical observation and treatment of this infant was mandated. Second, the Hospital had a written policy requiring admission of suspected victims of child abuse until the New York State Family Court determined whether to remove that child into State custody. There is no evidence in this case, other than the mere existence of the written policy, that Mora was held pursuant to that policy or for any reason other than the physicians' concern that she was suffering from methadone withdrawal. Mere allegations are not enough to establish a causal connection between the reason for the

hold and the hold itself. "A section 1983 action, like its state tort analogs, employs the principle of proximate causation." *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999). "As in all section 1983 cases, the plaintiff must prove that the defendant's action was a proximate cause of the plaintiff's injury." *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998). Although proximate causation in the section 1983 context is a question of federal law, in determining the meaning of the concept, courts look to those state tort analogs, because this Court has made it crystal clear that principles of causation borrowed from tort law are relevant to civil rights actions brought under section 1983. *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997).

This Court, in *Malley v. Briggs*, 475 U.S. 335 (1986) endorsed the rule that courts "should read [section 1983] against the background of tort liability that makes a man responsible for the natural consequences of his actions". *Id.* at 344-45 n.7. However, part of this tort background is the concept of the "but for" test. A plaintiff must allege factual causation — *i.e.*, "but for" causation — in order to state a claim under section 1983. *Scott, supra*. In *Scott*, plaintiff brought an action under section 1983 against individuals who participated in his involuntary commitment to a mental institution. One of the defendants, Police Officer Idler, had written and submitted a report regarding Scott's mental condition. Plaintiff alleged that it was this report together with the co-defendant's, Dr. Hern, examination that was the "direct and proximate" cause of the deprivation of his constitutional rights. However, the Tenth Circuit found otherwise and stated that these facts were bald allegations. The Tenth Circuit found that

> even assuming that Idler included false statements in his report and then gave that report to Hern knowing it would be used to seek Scott's involuntary commitment, it is simply not the case that, "but for" Idler's preparation and provision of the report, Scott would not have been committed . . . And even if Idler's report was sufficient in itself to support Scott's commitment, it was not a substantial factor because it was insignificant in relation to the other facts set forth in [Hern's] affidavit.

Id. at 911. Similarly, in *Monell v. New York City Dept. of Social Svcs.*, 436 U.S. 658 (1978) this Court held that official policy must be the "moving force of the constitutional violation" in order to establish the liability of a government body under section 1983. *Id.* at 694.

These cases are similar to the situation of the two alleged factors upon which Petitioners base Mora's detention in the Hospital. All of the evidence has proven that the only factor upon which Mora was held in the Hospital for the first 8-9 days was the medical judgment of the physicians that Mora was suffering from methadone withdrawal. There has been no testimony to the contrary and both courts below concurred that Mora was held on a medical basis while she was being treated and observed for methadone withdrawal. Therefore, Petitioners' bald allegations that Mora was held pursuant to a written policy can not withstand the "but for" test. As Mora was not held by the Hospital pursuant to the Administrative Policy, nor was she held by any act fairly attributable to, or entwined with, the State and the Hospital through its administrators or physicians are not entwined with the State so as to satisfy the test recently enunciated in *Brentwood*, the Second Circuit's decision was entirely consistent with *Brentwood*.

B. Contrary to Petitioners' Contention, There Was No Due Process Deprivation Here and There is No Significant "Split" Among the Circuit Courts on the Due Process Issue in the Child Welfare Context.

Both courts below, in viewing the facts and resolving all ambiguities in favor of Petitioners, correctly held that Petitioners were not deprived of due process.

Respondents fully agree with Petitioners that the parent-child relationship is a fundamental liberty interest and one that is deserving of the greatest sanctity. Of that there is no dispute. However, Petitioners fail to note that this principle is not without qualification. As the Federal courts have observed, "[t]hese substantial private interests are not without public counterpart in the context of protective custody by the State." *Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994). Indeed, this Court has stated that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

Contrary to the record below and the Second Circuit's findings, Petitioners stubbornly contend that the "deprivation" here lasted significantly longer than one day. Petitioners, fully aware that the Federal courts have routinely found no due process violation in similar situations, are forced to maneuver around the indisputable facts herein in an attempt to enlarge the arguable period of deprivation from one day to a week or more. Petitioners have failed in this regard.

The Second Circuit, in reviewing the District Court's granting of summary judgment *de novo*, construed the evidence in the light most favorable to Petitioners and found there to be:

> [I]nsufficient evidence in the record to support a finding that the Hospital's decision to hold Mora until she was medically cleared was made for CWA-related purposes . . . Mora would have been released to her mother at her mother's insistence despite Hospital's doctors' concerns that Mora might be suffering from life-threatening methadone withdrawal. Such evidence does not establish state action by the hospital in retaining Mora pending her medical release.

Pet. App. at B12.

Thus, in reviewing the record most favorable to Petitioner, the Second Circuit concluded that:

> [T]he Hospital did not hold Mora in its capacity as a state actor *until after* the primary evidence of abuse had been discredited, when the drug test indicated the absence of methadone in Mora's urine and she was medically cleared for release.

Pet. App. at B17 (emphasis supplied). Accordingly, for the Second Circuit, the due process clock began ticking once the child was medically cleared as that was when the infant's hospitalization transformed legally from "non-state action" to "state action."

1. Substantive Due Process

Analysis of the due process liberty interest involves evaluation of both substantive and procedural safeguards. *Van Emrik v. Chemung Co. Dep't of Social Svcs.*, 911 F.2d 866 (2d Cir. 1990).

Inherent in the analysis of substantive due process is a balancing of the two competing interests discussed above, *i.e.*, the sanctity of the parent-child relationship with the state's compelling interest to protect the child's health and safety, even if that involves protecting the child from his or her own parents. *See Wilkinson v. Russell*, 182 F.3d 89 (2d Cir. 1999); *Croft v. Westmoreland Co. Child and Youth Svcs.*, 103 F.3d 1123 (3d Cir. 1997).

This Court has stated that, " 'due process' has never been, and perhaps never can be, precisely defined." *Lassiter v. Department of Soc. Svcs.*, 452 U.S. 18 (1981). In a similar context, this Court has ruled that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Indeed, to establish liability, it must be shown that the executive action "shocks the conscience." *Id.* Mere negligence will not suffice. *Id.* at 848-49. As one court has observed, for liability to attach to a social worker in the custody context, the standard of culpability "must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience'." *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999) (holding no violation of substantive due process when social worker "reasonably believed" the children were in danger of abuse). *See also Weller v. Dep't of Social Svcs.*, 901 F.2d 387 (4th Cir. 1990); *Patterson v. Armstrong Co. Children and Youth Svcs.*, 2001 U.S. Dist. Lexis 6996 (W.D. Pa. 2001).

Given the constant friction between the competing interests in the child abuse investigation arena, the Second Circuit herein held that such an investigation will be deemed constitutional "provided simply that case workers have a

reasonable basis for their findings of abuse." Pet. App. at B17. *See also Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Miller, supra.*

Employing that standard here and analyzing the applicable time period for alleged due process deprivation ("a day or two in this case" Pet. App. at B17.), the Second Circuit held that this was a reasonable period of time for the CWA to process the information, review the case, decide whether to authorize release, and communicate their decision to the Hospital. Pet. App. at B17-18. Accordingly, the Second Circuit held that with respect to the Hospital:

> The Hospital's holding of Mora pending the outcome of this deliberative process is a reasonable accommodation of the state's compelling interest in protecting children from abuse and neglect.

Pet. App. at B18.

Even in *Bendiburg, supra*, a case relied upon by Petitioner to demonstrate a claimed schism in the circuits, the Eleventh Circuit found no substantive due process violation and stated that, "circumvention of parental authority for a *five-day period* did not rise to a level sufficiently egregious or shocking to sustain a substantive due process claim with respect to severance of the parent-child relationship." 909 F.2d at 468 (emphasis supplied).

2. Procedural Due Process

Under Petitioners' procedural due process claim they allege they were entitled to either or both of a pre-deprivation hearing and/or a post-deprivation hearing.

No pre-deprivation hearing was required here given that the infant was admitted to the hospital upon her birth and was monitored and treated over the ensuing days due to suspected methadone withdrawal. Even in a routine situation where no such abuse is suspected, a newborn child is admitted to the hospital for several days following birth for routine medical monitoring of both mother and child. In the face of suspected medical complications, that period may become extended in order to permit the medical staff to make the appropriate diagnosis and render the appropriate treatment. Petitioners certainly do not suggest that any patient admitted to a hospital, either infant or adult, is entitled to a pre-deprivation hearing while the medical staff is in the process of evaluating and treating a patient. Moreover, as the District Court noted, it is "uncontested that while Mora remained in the Hospital, Kia P. was permitted to, and did, visit Mora, including feeding times." Pet. App. at D4. That Kia P. was permitted unfettered daily access to her daughter throughout the hospitalization was a factual finding in the courts below.

As this Court has recognized that "due process is flexible and calls for such procedural protections as the particular situations demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), it is abundantly clear in the case at bar that it was neither necessary nor feasible for a prior hearing to be held. The infant was born in the hospital, was thought to have a serious medical condition, demonstrated known symptoms of that condition, was treated for that condition, and said condition was not medically resolved for several days. Hence, there was no indication or opportunity for a prior hearing. Once the medical evaluation was concluded, the infant remained in the hospital for a very brief period while the CWA determined no investigation would be

commenced and communicated their decision to the hospital. By the next morning, the infant was discharged home. As such, a pre-deprivation hearing was not possible.

As for the post-deprivation hearing, that argument becomes moot given that Kia P. discharged the infant from the hospital roughly one day following the cessation of the medical work-up for methadone withdrawal. The methadone evaluation was deemed complete as of April 6 or 7 and Kia P. signed her daughter out of the Hospital on April 8 at 11:20 a.m.[2] In fact, other courts that have addressed this issue in a similar context have upheld periods of deprivation that exceed the time period herein. *See, e.g., County of Riverside*, 500 U.S. 44 (1991); *Miller*, *supra*; *Jordan*, *supra*; *Patterson*, *supra*.

As the Second Circuit correctly held, the time period encompassing any conceivable "deprivation" here was minimal and was reasonable under the circumstances. Pet. App. at B21-22. While Petitioners paint a picture of a "split" throughout the Circuits on this issue, a reading of similar cases finds that contention to be off the mark. To the contrary, the Federal courts have held that deprivations that last brief periods of time, typically several days, until a hearing is held, are not violative of due process. *See, e.g., Jordan, supra* (holding that no hearing until 65 hours after the removal was constitutional); *Patterson*, *supra* (stating that seventy-two hours is the "outside tolerance of the Fourteenth Amendment"); *Cecere v. City of New York*,

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2. Indeed, it would seem overly generous to characterize this one day time period as a "deprivation" since once the lab results were received by the hospital and analyzed by the physicians on April 7, it was then determined that further medical observation was no longer necessary, and the wheels were set in motion to discharge the infant, which was accomplished *the following morning*.

967 F.2d 826 (2d Cir. 1992) (holding that a "deprivation" of four days was not violative of due process) Here, no post-deprivation hearing was ultimately necessary given that the Hospital discharged the infant within one to two days following the starting point of any arguable "deprivation" and that period of time was within the "prompt" time period that the Circuit Courts will tolerate in such situations. As this Court has observed, "the significance of such a delay cannot be evaluated in a vacuum." *F.D.I.C. v. Mallen*, 486 U.S. 230, 242 (1988).

Implicitly adopting the inherent rule of flexibility that must be considered in due process cases, the Second Circuit noted that the instant case is not the typical scenario in that the infant was already hospitalized when the alleged deprivation began. She was not forcibly removed from her mother, but rather was voluntarily placed in the hospital by virtue of her birth there. The Second Circuit then addressed whether a "prompt" post-deprivation hearing was held. Pet. App. at B20. In defining "prompt", the court noted that it had previously tolerated a four-day delay (*see Cecere, supra*), and held that the one to two days in the instant case was within the acceptable "breathing room" that the law provides child welfare officials to make decisions. Pet. App. at B22-22.

As illustrated by the aforementioned cases, the one to two days at issue herein is well within the outside parameters that have been established by the other circuits. Given the factual idiosyncrasies of child abuse cases, coupled with the inability to precisely define "due process", it is evident that the lower courts must be permitted flexibility to address each case individually. While Petitioners point to a "split" among the lower courts, Petitioners can point this Court to no credible evidence of the same.

CONCLUSION

For all of the foregoing reasons, Respondents Long Island College Hospital and Susan Morance respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 00-1800

IN THE
SUPREME COURT OF THE UNITED STATES

KIA P., individually and on behalf of MORA P., an infant,

Petitioners,

-v.-

ROSEMARY MCINTYRE, individually and as caseworker, Child Welfare Administration, DOREN DELAMOTHE, individually and as supervisor, Child Welfare Administration, NEW YORK CITY, LONG ISLAND COLLEGE HOSPITAL and SUSAN MORANCE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a private hospital, which holds an infant for medical reasons -- namely the danger that the infant is experiencing methadone withdrawal, a potentially fatal condition -- is not a state actor for purposes of 42 U.S.C. section 1983?

2. Whether the Court of Appeals correctly held that the hospital's failure to initiate a hearing regarding the infant's custody did not violate petitioners' procedural due process rights to a prompt post-deprivation hearing, where the infant was held only for one or two days after medical clearance?

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No. 00-1800

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Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Municipal respondents Rosemary McIntyre, Doren Delamothe and New York City ("municipal respondents") respectfully request that this Court deny the petition by petitioners Kia P. and her daughter Mora P. ("petitioners") for a writ of certiorari to review the opinion of the United

States Court of Appeals for the Second Circuit in this case (Pet. App. at B1-27).

The Second Circuit unanimously affirmed the October 30, 1998 judgment of the United States District Court for the Eastern District of New York (Block, J.), which had dismissed petitioners' action against municipal respondents and hospital respondents (Pet. App. at C1). In affirming, the Second Circuit held that respondent Long Island College Hospital, a privately owned and operated hospital, was not a state actor while holding petitioner Mora, a newborn, for eight or nine days for medical reasons -- the danger that she was experiencing methadone withdrawal, a potentially fatal condition.

The Court held that the hospital could be treated as a state actor only after it had medically cleared Mora and was holding her for one to two additional days, while it informed the Child Welfare Administration of New York City's Human Resources Administration of the medical clearance and received word that, as far as the agency was concerned, Mora could be discharged. The Court held, however, that the hospital's failure to obtain a hearing during that day or two did not violate petitioners' rights to a prompt post-deprivation hearing.

This Court should deny review. Contrary to petitioners' claim, the Second Circuit's decision as to state action does not conflict with this Court's decisions or those of other Circuits. Additionally, there is no split in the Circuit Courts as to the applicability of procedural due process to deprivations of parental custody by state actors.

Events of March 27 to April 8, 1993

On March 27, 1993, petitioner Kia P. arrived in labor at Long Island College Hospital -- a privately owned and operated hospital -- was admitted, and gave birth later that day to a baby girl, Mora (80-81, 224, 1014).[1] Kia P. informed hospital employees upon admission that she was HIV positive and also gave hospital employees medical records from North Central Bronx Hospital, which indicated past narcotics abuse (crack/cocaine), syphilis and possible TB exposure (82, 92, 94, 97-98, 104-06, 209-10, 252, 546, 590-91, 617, 880, 1015).

Because of Kia P.'s medical history, the hospital took a sample of Mora's urine and performed a toxicology screening test, pursuant to hospital policy and generally accepted medical procedures (205-06, 210-12, 546). Indeed, petitioners' own medical expert Marjorie Nicholson, a certified nurse midwife who knew Kia P. through Kia P.'s participation in a prenatal study at North Central Bronx Hospital, testified that a past history of drug abuse is a reason for testing an infant's urine and that Mora's urine probably would have been tested if Kia P. had given birth at North Central Bronx Hospital (267-68, 449, 461, 472). On March 29, 1993, hospital respondent Susan Morance, a hospital social worker, was informed that Mora's urine had tested positive for methadone (77, 82, 744).

As soon as the positive methadone result was received, hospital neonatologists and pediatricians placed Mora, who was considered "high risk for withdrawal," under medical observation for symptoms of methadone withdrawal. This was pursuant to their policy of

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[1] Unless otherwise indicated, numbers in parentheses refer to the pages of the Joint Appendix in the Second Circuit.

monitoring for a minimum of one week infants who test positive for methadone (79, 197-98, 213-14, 245, 247-48, 276-77, 280-81, 546). Hospital records indicated that Mora thereafter exhibited symptoms consistent with methadone withdrawal, such as irritability and tremors, on March 29-31, April 4 and possibly even as late as April 6 (86, 214-17, 243, 276, 278, 282, 284, 385-86, 395, 431, 546-47, 559, 567). In addition to being closely monitored, Mora was treated with swaddling, a semi-tight wrap that gives the infant a sense of comfort and security (277, 391, 546, 564).

Methadone withdrawal symptoms can present themselves up to approximately two weeks after an infant's birth, and can come and go. If an infant has been exposed to extreme doses of methadone, withdrawal can cause seizures or death (248, 280, 546-47, 563). Petitioners' expert Nicholson concurred that a finding of a positive urine toxicology is "very serious" — that "there is no getting around the fact that the urine shows methadone"; that infants exhibiting withdrawal symptoms, such as tremors and irritability, should remain in the hospital; and that symptoms of methadone withdrawal can occur up to two weeks after delivery (262-69). Symptoms consistent with methadone withdrawal can also be the result of causes other than methadone withdrawal (215, 563-64, 1035, 1096).

On March 29, 1993, the same day that the results of the drug test were received, hospital social worker Morance told Kia P. of the positive drug test and that, because of the test, Mora could not be discharged. Kia P. admitted that she had used crack/cocaine two years earlier, but denied that she had used methadone during her pregnancy (82, 195, 602-03, 752). After her conversation with Morance, Kia P. called her lawyer at Brooklyn Legal Services, who subsequently contacted both the hospital and the City's Child Welfare Administration ("CWA"), on Kia P's behalf

(88, 225, 768-69, 817-18). Throughout Mora's hospital stay, Kia P. was kept informed of Mora's medical condition and was allowed to visit and feed Mora (377-78, 385-86, 391-92, 395-96, 547, 606).

On March 29, pursuant to state statutory requirements, the hospital social worker also orally notified the New York State Central Registry for Child Abuse of the positive drug test, and the Central Registry, in turn, notified CWA (77, 83-84, 193-94, 196, 546). Pursuant to CWA's statutory mandate, municipal respondent Rosemary McIntyre, a CWA caseworker, immediately conducted an investigation, including a home visit on March 30, 1999, to evaluate the P.s and their home environment (126, 146, 148, 220-21). Mora's father informed McIntyre that he had used crack in the past, but denied using any type of drugs in the past two years (148). Kia P. also informed McIntyre that she had two other children, one who had been adopted and the other who was in foster care (150). McIntyre found that the apartment was nicely furnished and clean and that the P.s had a crib, ample clothing and food (146).

After the home visit, municipal respondent McIntyre informed hospital social worker Morance that Kia P. adamantly denied using methadone, and was told by the social worker that the doctors wanted to keep Mora under observation for methadone withdrawal (151, 220, 224-25). McIntyre remained in contact with the hospital social worker throughout the time that Mora remained in the hospital, to stay informed of Mora's medical status and when she would be medically ready for discharge (84-85, 87, 151-52, 227, 807-08). McIntyre also sent Kia P. and her husband to be tested for drugs, with their permission (151, 220-21, 647, 651-52).

Also on March 29, pursuant to routine hospital practice when a mother denies the use of drugs, as well as at Kia P.'s request, the hospital laboratory sent Mora's

urine specimen to SmithKline Beecham, an outside laboratory, for confirmation (85, 88, 238-39, 443, 754, 964). Due to the small quantity of urine, however, SmithKline Beecham did not have the facilities necessary to perform the test and, at the direction of the hospital, forwarded the urine to National Medical Services for microanalysis, using a gas chromatography/mass spectrometry test (85, 202, 239, 443, 985-86). On April 7, 1993, the hospital was informed that National Medical Services could not confirm the presence of methadone in Mora's urine specimen (218, 239, 255, 443, 562-63, 986-89).

Dr. Bjornson, the Section Chief of the hospital's Clinical Chemistry Laboratory (941), indicated that, in 1993, it was "very rare" — i.e., in much less than ten percent of the cases — that the confirmatory test did not confirm the presence of drugs (965). Additionally, Dr. Kamal, a pediatric resident at the hospital (865), stated that in the three years that he had worked in the hospital since Mora was discharged, he was unaware of any false positives (923).

Yet, according to plaintiff's expert Dr. John Morgan, an internist and professor of pharmacology (520), the screening test used by the hospital was imprecise and phenergan, an antihistamine that had been given to Kia P. during labor, very likely accounted for the first positive result (518). Nonetheless, Dr. Morgan was unwilling to state that opinion to a reasonable degree of medical certainty, and also admitted that he did not know when the last dose of phenergan was given, what the dose was or how long it takes for phenergan to travel through the placenta to the infant (522-23). The information sent out by the manufacturer of the EMIT screening test indicated that phenergan, also known as promethazine, does not

cross-react — i.e., show a positive response — at 75 micrograms per milliliter (960-61, 436).

An article written by Dr. Morgan entitled, "Problems of Mass Urine Screenings for Misused Drugs," indicated that many drugs cross-react to cause false positives on the screening test, but also admitted that most of these positives occurred at concentrations of the tested drugs that are not achievable in human urine and hence, are not practical problems (1072, 1067). The only specific reference to false positives involving methadone, in a subsection entitled "False Positives (or Unconfirmed Positives) in the Real World," was a 1974 study, which found that the screening test had a 2.6 % false positive rate for methadone (1074). Dr. Morgan admitted that the EMIT screening test is useful as a screening test, but should be independently confirmed through a gas chromatography/mass spectrometry test, as was done in this case (524, 1074).

Either on April 6 or April 7, the treating physicians medically cleared Mora for discharge, changing her status to "alternate level of care" ("ALC") (89, 253, 283, 547, 818-20, 827-28, 908, 925). On April 7, 1993, the hospital social worker informed CWA that Mora was medically cleared for discharge (89, 226, 236, 547), pursuant to the policy of CWA and the hospital that, when a child is in the hospital and there has been a report to the State Central Registry, CWA's permission is needed before the child can be discharged (1064, 1042 ¶J, 792).

It is uncontroverted that CWA determined that same day that it did not intend to take any action with respect to Mora, in light of its investigation and the fact that the drug tests of Kia P. and her husband had come back negative (222, 233). (The drug test results appear to have been received by the clinic that performed the tests on April 4 and 6 [169-70]). Due to the lateness of the hour, CWA's

caseworker McIntyre was unable to contact the hospital social worker (222, 227). On April 8, 1993, McIntyre contacted the social worker and advised her that CWA did not intend to take any action with respect to Mora (90, 152, 226). Mora was discharged from the hospital that day (79).

The Absence of a CWA "Social Hold"

CWA case worker McIntyre explained that a "social hold" is a direction from CWA not to allow a patient to go home, after the doctor has medically cleared the patient (223). McIntyre and her supervisor Doren Delamothe both gave deposition testimony, and CWA's case records indicate, that CWA never placed a "social hold" on Mora (120-89, 222-23, 230-31).

Kia P. also admitted that CWA never used the term "social hold," only the term "medical hold" (677). Kia P. stated that CWA had told her that the hospital had placed a hold on the baby and was waiting for the results of Mora's confirmatory test (643-44, 650, 652-53, 661, 671-72, 677). According to Kia P., only the hospital social worker and a doctor had told her at some point that she could not take her daughter home, because the hospital had found methadone in her urine and because Mora was under a "social hold" (602-04, 677-78, 680-82, 711-12). The doctor, however, also said that the "social hold" was by the hospital's social worker (680-82).

The hospital social worker denied having used the term "social hold" and explained that Mora had to remain in the hospital, because she was not medically cleared, given the positive methadone toxicology and the resulting medical observation, and because a report had been made to the State Central Register (774-76, 808, 843-44). The hospital social worker further explained that she would have had discretion to wait until the confirmatory test was received from the outside laboratory, before reporting

Mora's case to the State Central Register, because Mora had to remain in the hospital for medical reasons anyway (779-80). The hospital social worker emphasized that, even if CWA had submitted discharge plans prior to April 7, Mora could not have been discharged before receiving medical clearance, and that she did not have, and would not have had, any discussions with CWA about Mora remaining in the hospital, before Mora was medically cleared (199, 801, 847-48). It was only once Mora was medically cleared that the hospital needed CWA's approval before releasing her (199-200, 786, 801-02, 812-13).

Additionally, while Mora's hospital chart contained entries reflecting that she was on "social hold" (79), Dr. Kamal, admitted that he had mistakenly made the entry, because he was not familiar, at the time, with the terms "medical hold" and "social hold"; that Mora was, in fact, on medical hold; and that it was impossible to be on a social and medical hold at the same time (242-43, 248, 279, 880-81, 886-88, 927-28).

This Action

In 1994, petitioners brought this action for damages and injunctive relief, pursuant to 42 U.S.C. section 1983 and New York state law, alleging *inter alia* the wrongful detention of Mora by hospital respondents and municipal respondents (17-32). Both municipal respondents and hospital respondents moved for summary judgment (65-66, 285-86).

District Court Decision

In granting respondents' motions for summary judgment and dismissing the complaint, the District Court held, as an initial matter, that the hospital's practices were sufficiently entwined with City policy to warrant treating hospital respondents as state actors for purposes of the section 1983 claims (Pet. App. at D9-11). The Court

explained that merely providing medical care to Mora would not subject hospital respondents to liability under section 1983 (*id.* at D11). The Court, in fact, found that the hospital personnel continuously monitored Mora to determine whether she was suffering from methadone withdrawal, and that hospital records indicated that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal (*id.* at D3-4).

The Court, however, found that the hospital had done more than simply treat Mora (Pet. App. at D10). The Court found that the hospital had implemented a policy of holding children who were the subject of child abuse investigations, even if there was no medical reason for doing so, until it received notification from CWA that its investigation was complete (*id.*). The Court found that but for the actions of the hospital in holding Mora, CWA presumably would have needed to take some action to detain the child or would have needed to determine on an expedited basis whether she should have been released (*id.*).

Notwithstanding its conclusion that the hospital was a state actor, the District Court held that neither hospital respondents nor municipal respondents had violated petitioners' constitutional rights and that the factual issues identified by petitioners did not affect the availability of summary judgment (Pet. App. at D22). That is because, even if these issues were resolved in petitioners' favor, they did not give rise to questions of fact that required a trial of the constitutional claims (*id.*).

With regard to procedural due process, the District Court held that no pre-deprivation hearing was required, because the positive toxicology screen gave respondents an adequate emergency basis for detaining Mora, since the initial results provided an objective basis for the hospital's concern that Mora had been exposed to drugs in utero (Pet.

App. at D15-16). The Court also held that no post-deprivation hearing was required, because, in light of the imminence of the confirmatory test results and the probability of confirmation, there was a minimal risk that petitioners would be erroneously deprived of their liberty interests, and there was no pragmatic reason to implement any procedural safeguard (*id.* at D16-18). Additionally, the Court found that while respondents awaited the expected confirmatory test results, their interest in protecting Mora from the risk of child abuse continued (*id.* at D18). The Court also noted that "there is a fair amount of precedent for rejecting procedural due process claims based upon comparable periods of delay under related circumstances" (*id.* at D18).

The District Court further held that respondents had not violated petitioners' rights to substantive due process, Fourth Amendment protection or an adequate child abuse investigation, and had not discriminated against Kia P. based on her HIV status (Pet. App. at D13-15, D18-22). Finally, the Court held that municipal respondents McIntyre, the CWA caseworker, and Delamothe, her supervisor, were entitled to qualified immunity (*id.* at D23-27).[2]

Having dismissed the constitutional claims, the District Court declined to exercise supplemental

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[2] The Court also held that municipal defendants Sabol and Little, the Commissioner of the City's Department of Social Services and the Executive Deputy Commissioner of CWA, respectively -- who are not parties to this petition -- were not liable in their individual capacities, because there was no evidence in the record that they were personally involved in the actions giving rise to this case (49 ¶¶8, 11; Pet. at ii, App. at D23).

jurisdiction over petitioners' state law claims (Pet. App. at D28). In a second amended judgment, the Court also dismissed respondents' cross-claims as moot, in light of the dismissal of petitioners' entire complaint (*id.* at C1-2).

Court of Appeals Decision

By opinion entered December 5, 2000, the Court of Appeals for the Second Circuit unanimously affirmed the dismissal of the action. Judge Sack wrote the opinion, in which Judge Feinberg joined (Pet. App. at B1). Judge Van Graafeiland concurred in the result (*id.* at B27).

As an initial matter, the Second Circuit concluded based on the evidentiary record that between the receipt of the first positive test and Mora's ultimate medical clearance eight or nine days later, Mora was held for medical reasons, not concerns about possible parental mistreatment or any CWA policies (Pet. App. at B4-5, B12 n.2). The Court emphasized that the medical staff made the initial decision to withhold Mora's release because of its belief that Mora had methadone in her bloodstream and was in danger of methadone withdrawal, a potentially fatal condition (*id.* at B4-5, B11). Like the District Court, the Circuit noted that the hospital records indicated that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal (*id.* at B4-5, B11).

The Second Circuit further found that Mora was medically cleared for discharge on April 6 or 7, due to the combination of the second laboratory report, which failed to confirm the positive result of the hospital's methadone test, and Mora's apparent good health at that time (Pet. App. at B5, B11). The Court found that it was only after the medical clearance that the hospital's medical staff told hospital social worker Morance that Mora was medically ready to leave the hospital (*id.* at B5, B11). Morance then informed CWA caseworker McIntyre of the clearance, and

CWA decided that it would not seek custody of Mora (*id.* at B5-6). The Court found that CWA caseworker McIntyre returned Morance's call, but was unable to reach her because she had left for the day (*id.* at B6). McIntyre succeeded in contacting Morance the next day, April 8, and informed her of CWA's conclusion that Mora should be discharged (*id.*). Mora was discharged from the hospital that day, a day or two after the medical clearance (*id*).

As a result of these evidentiary findings, the Second Circuit held that the hospital's actions until April 6 or 7 -- testing Mora's urine for methadone, holding and treating Mora for methadone withdrawal, and medically clearing Mora after the negative confirmatory test -- were taken in its capacity as a private provider of medical care, not as a state actor (Pet. App. at B11).

The Second Circuit held that the hospital was subject to liability as a state actor, only after Mora had been medically cleared on April 6 or 7 (Pet. App. at B12-15). The Court found that at that point, after having informed CWA of the medical clearance, the hospital was holding Mora solely in its social welfare role, until CWA informed the hospital on April 8 that it would not seek custody of Mora (*id.*). Hence, the Court held that during this one or two day period after medical clearance, the hospital was subject to liability under section 1983.

The Second Circuit, however, held that hospital respondents did not violate petitioners' procedural due process rights to a prompt post-deprivation hearing, by holding Mora for that additional day or two after she had been medically cleared, while seeking CWA's advice as to her release (Pet. App. at B20-21). Additionally, the Court explained that a pre-deprivation hearing, which is required in non-emergency situations, was not possible in this case (*id.* at B21 n.4). That is because at the moment the hospital's custody became state action -- upon Mora's

medical clearance -- the hospital already had custody of Mora (*id.*).

The Second Circuit noted that had the hospital held Mora the entire ten days without a hearing solely for purposes of protecting her from possible abuse or improper parental care, there is a serious danger that the hospital, as a state actor, would have violated petitioners' procedural due process rights (Pet App. at B23). The Court emphasized, however, that municipal respondents would be entitled to summary judgment in any event, because there was no evidence that CWA or any of its employees proximately caused Mora to be kept from her parents without a hearing (*id.*). The Court found that no CWA employee ever directed the hospital to hold Mora against her parents' wishes pending the CWA investigation. Further, while CWA had a policy prohibiting hospitals from releasing children under CWA investigation without CWA permission, the Court found that there was no evidence that Mora was detained pursuant to that policy (*id.*).

Finally, the Second Circuit held that respondents did not violate petitioners' rights to substantive due process, protection under the Fourth Amendment, or equal protection (Pet. App. at B15-18, B23-27). The Court did not reach the issue of qualified immunity.

By order entered on February 26, 2001, the Second Circuit denied petitioners' application for rehearing and rehearing in banc (Pet. App. at A1-2).

REASONS FOR DENYING THE PETITION

I.

THE SECOND CIRCUIT'S DECISION AS TO STATE ACTION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR THOSE OF OTHER CIRCUITS.

Contrary to petitioners' claim (Pet. Pt. I, pp. 10-17),[3] the Second Circuit's decision as to state action does not conflict with the decisions of this Court or the Eleventh Circuit. Rather, petitioners' claimed conflict is based only on their disagreement with the Second Circuit's conclusion, based on a review of the evidentiary record, that the hospital was holding Mora for medical reasons until April 6 or 7, not due to a CWA policy or concerns about child abuse.

[3] Interestingly, petitioners did not raise the issue of state action in their application for rehearing and rehearing in banc in the Second Circuit.

Such disagreement, however, does not render this case worthy of certiorari. It is well settled that a case which turns only upon an analysis of the particular facts involved is not worthy of certiorari. *See, e.g., NLRB v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981) (dismissing the writ of certiorari as improvidently granted, because it primarily presented an analysis of the factual evidence in the record, which did not merit this Court's review); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508, 509 (1924) (dismissing the writ of certiorari, where the controverted issue primarily presented a question of fact as to the sufficiency of the evidence).

In this case, as previously discussed, the Second Circuit held that Mora was held for medical reasons until she was medically cleared by the hospital on April 6 or 7, not concerns about possible parental mistreatment and CWA policies (Pet. App. at B5, B11-12 & n.2). The Court found that the medical staff made the initial decision to withhold Mora's release and observe her for methadone withdrawal -- a potentially fatal condition, which can take a minimum of one week to manifest itself (*id.* at B4-5). The Court also found, based on the undisputed hospital records, that Mora exhibited tremors and irritability -- symptoms consistent with methadone withdrawal (*id.* at B4, B11; 86, 214-17, 243, 276, 278, 282, 284, 385-86, 395, 431, 546-47, 559, 567). The Court's findings that the hospital medically monitored Mora for methadone withdrawal and that Mora exhibited symptoms consistent with methadone withdrawal, were also reached by the District Court (Pet. App. at D3-4, D16).

Further, the Second Circuit held that there was no evidence that CWA or any of its employees proximately caused Mora to be kept from her parents without a hearing (Pet. App. at B23). The Court explained that no CWA employee ever directed the hospital to hold Mora against her parents' wishes pending the CWA investigation (*id.*). Additionally, while CWA had a policy prohibiting hospitals from releasing children under CWA investigation without CWA permission, the Court found that there was "no evidence" that Mora was detained pursuant to that policy (Pet. App. at B23).

The Court's conclusion that CWA did not proximately cause Mora's detention is supported by CWA records and the deposition testimony of CWA employees McIntyre and Delamothe, which both unquestionably indicate that CWA never ordered a "social hold" of Mora (120-89, 222-23, 230-31). Indeed, even Kia P. admitted that CWA employees never used the term "social hold," only the term "medical hold" (677). Further, the hospital social worker undisputedly testified that: (1) the hospital had discretion to wait for a positive confirmative test before reporting the case to the State Central Register, because Mora had to remain in the hospital for medical reasons anyway; (2) even if CWA had submitted discharge plans, Mora could not have been discharged before she was medically cleared; and (3) the hospital did not have, and would not have had, any discussions with CWA about Mora remaining in the hospital, before Mora was medically cleared (779-80, 199, 801, 847-48).[4]

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[4] As set forth in municipal respondents' brief in the Second Circuit, any alleged statements by hospital employees and notations in the hospital record that Mora was under a CWA "social hold," both of which were either denied or explained as mistakes by the hospital employees

Petitioners disagree only with the Second Circuit's above-discussed evidentiary conclusions. Petitioners claim, for example, that the "Second Circuit disregarded the substantial evidence of [] CWA's involvement in the detention of the child and the governmental function the hospital was performing." *See* Pet. Pt. I at 15. Even petitioners' "questions presented for review" frame the issues as if the hospital had acted in concert with, and at the behest of, CWA (*id.* at i). Likewise, petitioners also claim that the Second Circuit's "factual conclusion," that CWA did not proximately cause Mora to be kept from her parents without a hearing, "was unwarranted by the evidence" and "improper on a motion for summary judgment. " *See* Pet. Pt. I at 17. Hence, even petitioners concede that their disagreement with the Second Circuit's decision involves only a dispute as to the evidentiary record -- a routine summary judgment issue, which is not worthy of certiorari.

Contrary to petitioners' claim (Pet. at 10-15), there is no conflict between the Second Circuit's decision as to state action and this Court's decision in *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924 (2001). In *Brentwood*, this Court held that a statewide interscholastic athletic association's regulatory activity constituted state action, due to the pervasive entwinement of state school officials in the association's structure, with the result that there was such a "close nexus" between the State and the association that their identities largely overlapped. 121 S.Ct. at 930-34.

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themselves, cannot be treated as admissions by CWA under the Federal Rules of Evidence. *See* Mun. Resp. Br. at 20.

For example, this Court relied, *inter alia*, on the facts that: (1) public high schools represented 84% of the association's voting membership; (2) the association was designated by the State to provide an integral element of public schooling -- interscholastic athletics; (3) members of the State Board of Education sat on the association's governing bodies; and (4) association employees could join the state retirement system. *Id.* at 932-34. This Court repeatedly emphasized that the issue of when a private actor can be treated as a state actor is necessarily a fact-bound inquiry. *Id.* at 930, 932. As discussed in detail by hospital respondents, this Court's analysis in *Brentwood* is consistent with this Court's previous holdings regarding state action. *See* Hosp. Resp. Br. in Opp. at 8-9.

The Second Circuit's decision in this case is consistent with *Brentwood*. In fact, the Second Circuit cited the entwinement test for state action in its decision (Pet. App. at B13). The Second Circuit also cited this Court's decision in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), which employed the same "close nexus" test as in *Brentwood*, and held that private nursing homes' decisions to discharge or transfer Medicaid patients to a lower level of care did not constitute state action, where, *inter alia*, the decisions involved medical judgments made by private physicians (Pet. App. at B11).

Thus, the Second Circuit followed this Court's precedent and employed the same tests as in *Brentwood*. The Court simply concluded, based on the factual evidence, that the refusal of the hospital to release Mora for reasons relating to child abuse and child welfare laws -- the entwinement -- did not become effective until after the medical clearance.

Similarly, contrary to petitioners' claim (Pet. Pt. I at 15-17), there is no conflict between the Second Circuit's decision and the Eleventh Circuit's decision in *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991). In *Bendiburg*, the Eleventh Circuit held that there were genuine issues of material fact as to whether private treating physicians and nurses had acted in concert with the State. That is because those defendants may have intentionally exaggerated the emergency nature of a boy's medical condition for the purpose of allowing the State to obtain temporary custody of the boy from his father, who would not consent to a certain medical procedure. *Id.* at 469.

In this case by contrast, as previously mentioned, the Second Circuit found that hospital respondents were holding Mora for legitimate medical reasons, and municipal respondents were not involved in any way in Mora's medical treatment. Again, petitioners' claimed split is based on the factual assumptions, either that hospital respondents were holding Mora for child protective reasons at municipal respondents' behest -- not for legitimate medical reasons -- or that hospital respondents were primarily holding Mora for governmental reasons and only incidentally treating her. These assumptions, however, are not borne out by the record.

In short, the Second Circuit's decision does not conflict with the rulings of this Court or of the Eleventh Circuit, and this Court's decision in *Brentwood* would not have led to a different result had it been available at the time of the Second Circuit's decision. Rather, petitioners merely disagree with the Second Circuit's review of the factual evidence, which is certainly not a reason to grant the petition.

II.

THERE IS NO SPLIT AMONG THE CIRCUIT COURTS AS TO THE APPLICABILITY OF PROCEDURAL DUE PROCESS TO DEPRIVATIONS OF PARENTAL CUSTODY BY STATE ACTORS.

Contrary to petitioners' claim (Pet. Pt. II), there is no split among the Circuit Courts as to the applicability of procedural due process to deprivations of parental custody by state actors. Indeed, the procedural due process standards are well settled in all of the Circuits.

In analyzing the procedures that were due to petitioners in this case, the Second Circuit applied this Court's well-established three-factor test from *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), where this Court emphasized that due process, unlike some legal rules, is flexible and not a technical concept with a fixed content unrelated to time, place and circumstances. *See* Pet. App. at B18-19. The Second Circuit then explained that petitioners' due process claims were governed by those cases, where, as here, a parent has initially voluntarily granted temporary custody of a child to a third party, and a state actor, although not physically taking the child away, gains custody by refusing to release the child. The Second Circuit held that in those cases, the state has a duty to initiate a prompt post-deprivation hearing. *Id.* at B19-20.

The Second Circuit found that the hospital had not denied petitioners' rights to a prompt post-deprivation hearing, by holding Mora for one or two days without a hearing, after she was medically cleared. *See* Pet. App. at B21. The Court explained that that short time period was used by CWA to decide promptly whether to take any

action with respect to Mora, after it had received news of the medical clearance and of the drug test showing an absence of methadone. *Id.* at B21. In particular, after hospital social worker Morance called CWA caseworker McIntyre on April 7 to inform her of the medical clearance, McIntyre discussed the case with her supervisor. The supervisor, in consultation with McIntyre, decided that same day that CWA did not intend to take any action with respect to Mora. Unable to reach hospital social worker Morance that day due to the lateness of the hour, McIntyre successfully made contact with Morance the following day, April 8, and informed Morance that, as far as CWA was concerned, Mora could be discharged. *Id.* Mora was released from the hospital that same day, April 8. *Id.* The Second Circuit concluded that the Constitution allows state actors at least one to two days of breathing room to determine what action should be taken after parent and child have been separated. *Id.* at B22.

The Second Circuit noted that while a pre-deprivation hearing is required in non-emergency situations, a pre-deprivation hearing was not possible in this case. That is because, at the point that the hospital became a state actor -- upon medically clearing Mora -- the hospital already had custody of Mora. *See* Pet. App. at B21 n.4.

Contrary to petitioners' claim, the Circuit decisions cited by petitioners employ the same general procedural due process analysis as the Second Circuit: a pre-deprivation hearing is required absent exigent circumstances, and post-deprivation hearings must be held promptly. Hence, petitioners' claimed split is non-existent.

See Bendiburg v. Dempsey, *supra*, 909 F.2d at 467-68 (holding that under certain emergency circumstances, a parent's custodial rights may be temporarily terminated without notice, provided a prompt, meaningful post-

deprivation hearing is held); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (holding that removal of a child from the custody of his or her parents requires pre-deprivation notice and a hearing, except in extraordinary or emergency situations that justify postponing the hearing); *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106-07 (9th Cir. 2001) and *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) (holding that, except in emergencies, government officials are required to obtain prior judicial authorization before intruding on a parent's custody and that post-deprivation proceedings must be prompt); *Whisman v. Rinehart*, 119 F.3d 1303, 1310-11 (8th Cir. 1997) (holding that when the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state must initiate an adequate and prompt post-deprivation hearing); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020-21 (7th Cir. 2000) (holding that, absent exigent circumstances, a predeprivation hearing is required before government officials remove a child, and that post-deprivation judicial review must be prompt and fair); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983), *cert. denied*, 465 U.S. 1033 (1984) (holding that removal of a child from a parent requires notice and a pre-deprivation hearing unless there are exigent circumstances, in which case a hearing is required promptly thereafter); *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (holding that the requirements of due process may be delayed in an emergency, provided that adequate post-deprivation process is promptly accorded); *Miller v. City of Philadelphia*, 174 F.3d 368, 372-74 & n.4 (3d Cir. 1999) (noting, in a case that involved an emergency removal, that initiating child custody proceedings by ex parte orders is

generally constitutional if a prompt post-deprivation hearing is held).[5]

Moreover, none of the Circuit decisions cited by petitioners found any procedural due process violation based on a one or two day hold or removal without a hearing. Indeed, in *Campbell v. Burt*, *supra*, 141 F.3d at 929, 931, the Ninth Circuit explicitly held that as of April 1993 -- the same time period involved in this case -- there was no clearly established federal case law that even a seven-day delay before obtaining post-deprivation judicial review would violate procedural due process.

See also Newton v. Burgin, 363 F. Supp. 782, 785-88 (W.D.N.C. 1973) (3 judge panel), *aff'd w/o op.*, 414 U.S. 1139 (1974) (holding that a statute did not violate the plaintiffs' due process rights, where the statute provided for a post-deprivation hearing on the merits within five business days after the state's assumption of custody); *Jordan v. Jackson*, *supra*, 15 F.3d at 344-53 (the Fourth Circuit holding that a delay of 65 hours [less than three days] in providing post-deprivation judicial review did not violate the parents' due process rights); *Miller v. City of*

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[5] The Fifth Circuit decisions cited by petitioners do not conflict with the other Circuits, but simply do not discuss the specific requirements of procedural due process, as they do not involve the timing of a required hearing. *See Morris v. Dearborne*, 181 F.3d 657 (5th Cir. 1999); *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000). The Fifth Circuit merely made the general statement that the Fourteenth Amendment grants parents the right to fundamentally fair procedures before having their child removed from their home. *Morris*, 181 F.3d at 669 n.7.

Philadelphia, supra, 174 F.3d at 372 n.4 (the Third Circuit noting that its district courts have held statutes to be constitutional, which required a post-deprivation hearing within 72 hours).[6]

In short, there is no split among the Circuit Courts as to the applicability of procedural due process to deprivations of parental custody by state actors.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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[6] None of the Circuit decisions cited by petitioners involved the same factual scenario as here, where a predeprivation was not possible because Mora was already in the hospital's custody at the time the hospital medically cleared Mora.

(4)

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In The
SUPREME COURT OF THE UNITED STATES

KIA P., INDIVIDUALLY AND ON BEHALF OF MORA P.,
Petitioners,

v.

CITY OF NEW YORK, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. RESPONDENTS' BRIEFS IN OPPOSITION FAIL TO COUNTER THE FACT THAT THE SECOND CIRCUIT'S RULINGS ON STATE ACTION ARE CONTRARY TO THE *BRENTWOOD ACADEMY* ENTWINEMENT TEST, AND IGNORE IMPORTANT FACTS IN THIS CASE

A. Under *Brentwood Academy*, A Private Body That Performs A Public Function Delegated by the State is Acting "Under Color of State Law" Even if The Private Entity is Also Performing A Non-State Function the Same Time

Respondents give no adequate response, in their brief in opposition, to the fact that the Second Circuit ruled contrary to the law, as explained in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). The Second Circuit correctly observed that:

> There is evidence from which a jury could conclude that in addition to the Hospital's medical decision not to issue a release until April 6 or 7 pursuant to its medical relationship with Mora, it also put a hold on her release in its social welfare role because of its concern about her care in the hands of her mother. As the district court correctly found, insofar as the Hospital was acting in the latter capacity – as part of the reporting and enforcement machinery for CWA, a government agency charged with detection and prevention of child abuse and neglect – the Hospital was a state actor.

Kia P. v. McIntyre, 235 F.3d 749, at 755 (2nd Cir. 2000).

The Second Circuit then went astray when it concluded, contrary to *Brentwood Academy*, that the "state action" aspect of the Hospital's hold on Mora was somehow nullified for the first eight or nine days of Mora's detention because the Hospital was concurrently providing private medical services. 235 F.3d at 757. This Court has never ruled that a person is either always a state actor or never a state actor. On the contrary, in determining state action, this Court focuses not on the actor, but on the "challenged action" itself. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, ___, 121 S.Ct. at 930 (2001), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Thus, even a public employee acts under color of state law only "while acting in his official capacity or while exercising his responsibilities pursuant to state law," *West v. Atkins*, 487 U.S. 42, 50 (1982), *i.e.*, not when he is off duty. Likewise, a physician in private practice, who is hired by the government to provide medical treatment for prisoners, acts under color of state law while treating the prisoners, even though he acts in his private capacity while treating his private patients. *West v. Atkins*, 487 U.S. 42, 54 (1982).

The Second Circuit's ruling, moreover, conflicts with the ruling of the Ninth Circuit in *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000). In *Jensen*, the Ninth Circuit held that hospital staff acted under color of state law in making the determination to detain individuals "who are believed to be mentally ill." 222 F.3d at 575.

B. The Evidence Shows That the "Hold" on Mora P. Was Not Solely a Medical Hold, But Was At Least Partly Due to CWA Directive, For the Entire Eleven Days

Hospital respondents insist that the Second Circuit correctly affirmed the grant of summary judgment in favor of the respondents, and that there was no due process deprivation. To support that contention, the respondents repeatedly rely on the Second Circuits' conclusion that the first eight or nine days of the "hold" on Mora P. was solely (or primarily) a "medical hold" and that only one or two days of the hospital's refusal to release the infant to her mother were purely due to CWA directive. The facts of this case prove that conclusion incorrect.

First, if the hold were purely a "medical hold" for the first eight or nine days, then the hospital would have been required to release Mora P. in response to Kia P.'s repeated demands for custody of her daughter. New York law does not permit hospitals to detain patients who are allegedly suffering from physiological, as opposed to psychological, health conditions. *White v. Albany Medical Center Hospital*, 151 A.D.2d 859, 592 N.Y.S.2d 83 (3rd Dept. 1989). Moreover, under New York law, patients who refuse medical treatment cannot be treated, even if doctors think that the treatment is necessary to save the lives of the patients. *Fosmire v. Nicoleau*, 75 N.Y.2d 218, 551 N.Y.S.2d 876, 551 N.E.2d 77 (1996).

Second, both opinions below recognized that the Hospital had non-medical reasons for detaining Mora P. over Kia P.'s objections. As the Second Circuit recognized, "[s]ome evidence suggests that if the Hospital does not have concerns relating to the ability of a parent properly to care for an infant, there may be circumstances when, at least absent further action

by the Hospital, that parent may take the child home despite 'medical advice' to the contrary." *Kia P. v. McIntyre*, 235 F.3d at 756, n.2. In the summary judgment context "some evidence" is enough for Kia P. to overcome a motion by the hospital. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322-323 (1986). Likewise, the District Court found that "the Hospital did more than simply treat Mora." App. at D10. Because the hospital failed to release Mora P. in response to Kia P.'s demands, it must have been operating according to some other directive and holding Mora P. under some other authority than a "medical hold."

Third, if the hold were purely a "medical hold" for the first eight or nine days, then the hospital should have released Mora P. to her mother the moment the medical hold was lifted by the doctors, on April 6, 1993. By continuing to hold Mora P. at that point, until it received clearance from CWA, the Hospital demonstrated that it had seized custody earlier pursuant to CWA directive, and would not relinquish that custody until CWA released the hold. Notably, the hospital did not "re-seize" Mora P. on April 6 pursuant to a new CWA instruction after Mora P.'s doctors cleared her for medical release – the hospital merely *continued* to hold Mora P. pending contrary instruction from CWA.

Fourth, if the hold was purely a "medical hold" for the first eight or nine days, then the hospital social worker, Susan Morance, would not have told Kia P. that her newborn baby had been placed under "social hold" as soon as the positive methadone test had been reported to the State Central Register, according to state law and hospital policy. New York Soc. Serv. Law §§ 413, 417; Long Island College Hospital Administrative Procedures and Information Manual SO-100 *See* Ex. G to the Petition for Writ of Certiorari. Morance told Kia P., "I have to talk to... CWA" and "Your daughter has a

social hold on her. You will not be able to take her home. This is a case of CWA." *Kia P. v. McIntyre*, 235 F.3d at 752.

Finally, even Municipal Respondents agree that Hospital Respondents held Mora for non-medical reasons. As Municipal Respondents note, a hospital physician stated that Mora was detained pursuant to a "social hold." Municipals Respondents' Brief, at 8. Indeed, Mora's hospital chart contains repeated notations that the infant was on a "social hold," *Id.* at 9, entries which Hospital Respondents have attempted to disavow.

The evidence clearly shows that the hospital's hold on Mora P. was never purely a "medical hold" but was due to joint City and Hospital policy for the entire eleven days the baby girl was kept from her mother's custody. Even if that issue is in doubt as an evidentiary matter, that factual question must be assumed to be resolved in favor of the petitioners, since respondents moved for summary judgment. As Kia P.'s Petition for Writ of Certiorari amply argues, an eleven-day seizure into protective custody without any hearing before or after seizure certainly constitutes a due process violation.

II. The State Action and Due Process Issues in the Child Welfare Context in This Case Are of National Importance, as the Vast Majority of States Require Hospitals by Law to Comply with Child Protective Agency Directives in Handling Cases of Suspected Child Abuse

The instant case arises in significant part as a result of New York State law that mandates that hospital officials both report cases of suspected child abuse to the New York government, and, in some circumstances, seize custody of children who are suspected to be victims of child abuse. New York Soc. Serv. Law §§ 413 & 417. As the Second Circuit observed, under

these circumstances, private hospitals are acting as the "reporting and enforcement machinery for CWA." 235 F.3d at 756.

New York is certainly not alone in its mandatory enlistment of private hospitals and hospital staff in doing the work of the state child welfare agency. Forty-seven states and the District of Columbia include doctors or other hospital officials among those who are required by law to report suspected abuse to their appropriate state agency.[1] Several states, like New York,

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1. Alabama, Code of Ala. Sec. 26-14-3(a) (2001); Alaska, Alaska Stat. Sec. 47.17.020(a)(1) (2001); Arizona, A.R.S. sec. 13-3620(A) (2000); California, Cal. Pen. Code sec. 11165.7(a)(21) (2001); Colorado, C.R.S. 19-3-304(2)(a) (2000); Connecticut, Ct. Code sec. 17a – 101 (b); Delaware, 16 Del. C. Sec. 903 (2000); District of Columbia, D.C. Code sec. 2-1352(b); Florida, Fla. Stat. Sec. 39.201(1)(a) (2000); Georgia, O.C. G. A. Sec. 19-7-5(c)(1)(A); Hawaii, HRS sec. 350-1.1(a)(1) (2000); Idaho, Idaho Code sec. 16-1619(a) (2000); Illinois, 325 ILCS 5/4 (2001); Indiana; Ind. Code sec. 31-33-5-1 (2000) (any individual); Iowa, Iowa Code sec. 232.69 (1)(a) (2001); Kansas, K.S.A. 38-1522 sec. 2(a) (2001); Kentucky, KRS sec. 620.030 (2) (2001); Louisiana, La. Ch.C. Art. 603(13) (2000); Maine, 22MRSA sec. 3477(1)(A) (2001); Maryland, Md. Code sec. 5-704(a) (1987); Michigan, MCL sec. 722.623 (1) (2001); Minnesota, Minn. Stat. Sec. 626.556 subd. 3(a)(1)(2000); Missouri, sec. 210.115(1) R.S.Mo. (2000); Montana, sec. 41-3-201(2)(a), MCA (2001); Mississippi, Miss. Code Ann. Sec. 43-21-353(1) (2001); Nevada, Nev. Rev. Stat. Sec. 432B.220(3)(a) (2001); Massachusetts, Mass. Ann. Laws ch. 119, sec. 51A (2001); New Hampshire, RSA 169-C:29 (2000); New Jersey, N.J. Stat. Sec. 9:6-8.10 (2001); New Mexico, N.M. Stat. Ann. Sec. 32A-4-3(A) (2000); New York, NY CLS Soc. Serv. Sec. 413 (1) (2001); North Carolina, N.C. Gen. Stat. Sec. 7B-301 (2001)(any person or institution); North Dakota, N.D. Cent. Code, sec. 43-17-41(1) (2000); Ohio, ORC Ann. 2151.421(A)(1)(b) (Anderson 2001); Oklahoma, 10 Okl. St. Sec. 7103(A)(1)(a) (2000); Oregon, ORS sec. 419B.010(1) (1999)(any

require hospitals to seize custody of children under certain circumstances. *See* Petition for Certiorari, p. 6 n.4.

With doctors and hospitals all over the country acting as the "reporting and enforcement machinery" of state child welfare agencies, the citizens and courts need clarification from this Court as to when these private officials and institutions will be held responsible, as arms of the state, for violating the constitutional rights of the people.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, Petitioners pray that their petition be granted and that this Honorable Court decide the issues raised therein, or in the alternative, that the Court vacate the judgment of the Second Circuit and remand the case to the District Court for further proceedings not inconsistent with the standards enunciated in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288.

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public or private official); Pennsylvania, 23 Pa. C.S. sec. 6311(B)(2000); Rhode Island, R.I. Gen. Law. Sec. 40-11-3(a)(2001) (any person); South Dakota, S.D. Codified Laws sec. 26-8A-3 (2001); Tennessee, Tenn. Code Ann. Sec. 37-1-403(a)(1) (2001); Texas, Tex. Fam. Code sec. 261.101(b) (2000); Utah, Utah Code Ann sec. 62A-4a-403 (1) (2001); Vermont, 33 V.S.A. sec. 4913(a) (2001); Virginia, Va. Code Ann. Sec. 63.1-248.3(A)(1) (2001); Washington, Rev. Code Wash. Sec. 26.44.030(1)(a) (2001); West Virginia, W.Va. Code sec. 49-6A-2 (2000); Wisconsin, Wis. Stat. Sec. 48.981(2) (2000); and Wyoming, Wyo. Stat. Sec. 14-3-205(a) (2001)(any person).

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